INDEX

	Page
Opinions and Orders Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions, Statutes and Rules Involved	3
Statement of the Case	3
Summary of Argument	7
Argument	9
I. INTRODUCTION	9
II. THE CONSTITUTIONAL VIOLATIONS	13
A. The Unitary Establishment and Operation of Petitioner School District	13
B. Violations of the Detroit School District	15
C. Actions of Defendants Milliken, et al	18
D. Summary as to the Alleged Violations	31
III. THE REMEDY	34
A. The Scope of the Plan	34
B. The Predicates for Relief: Intent and Nexus	36
IV THE PROPOSED DECLARATION OF NEW CONSTITUTIONAL RIGHTS	39
A. The Racial Indentifiability Theory	39
B. Maintenance of Local School Districts as a Legitimate State Interest	46
C. Summary as to New Constitutional Rights	57
V. VIOLATION OF PETITIONER'S RIGHTS OF DUE PROCESS	58
Conclusion	65
Constitutional Provisions, Statutes and Rules Involved	1aa

TABLE OF AUTHORITIES

Page

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Armstrong v. *Manzo*, 380 U.S. 545, 14 L. Ed. 2d 62 (1965)... 61

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Bradley v. *Milliken*, 438 F. 2d 945 (6th Cir. 1971). 23

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Bradley v. *Milliken*, 484 F. 2d 215 (6th Cir. 1973).... 1,34,39,58

Bradley v. *School Board of the City of Richmond*, 338 F. Supp. 67 (E. D. Va. 1972)..... 62

Bradley v. *School Board of the City of Richmond*, 462 F. 2d 1058 (4th Cir. 1972), *Aff'd by an equally divided court*, _____ U.S._____, 36 L. Ed. 2d 771 (1973).....38,39,49

Bradley v. *State Board of Education*, _____U.S._____, 36 L. Ed. 2d 771 (1973). 24

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Brown v. *Board of Education of Topeka*, 347 U.S. 483, 98 L. Ed. 873 (1954). 19,43,44,45,57

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Davis v. *School District of the City of Pontiac*, 443 F. 2d 573 (6th Cir. 1971). 41

Deal v. *Cincinnati Board of Education, 369 F 2d 55 (6th Cir.* 1966), *cert. denied*, 389 U.S. 847, 19 L. Ed. 114 (1967). . 41

Dred Scott v. *Sanford*, 60 U.S. 393 (1856) 43,44,45

Gomillion v. *Lightfoot*, 364 U.S. 339, 5 L. Ed. 2d 110 (1960)..... 46

Green v. *County School Board of New Kent County*, 391 U.S. 403, 20 L. Ed. 2d 716 (1968). 52,54,55

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	Page
Higgins v. *Board of Education of City of Grand Rapids*, Civ. No. 6386 (W. D. Mich., July 18, 1973).	28,62
In Re Oliver, 333 U.S. 257, 92 L. Ed. 682 (1948).	61
Jenkins v. *McKeithen*, 395 U.S. 411, 23 L. Ed. 2d 404 (1969).	61
Keyes v. *School District No. 1, Denver, Colorado*, ____ U.S. ____, 37L Ed. 2d 548 (1973)	12,21,33,37,52,53,55,56
Plessy v. *Ferguson*, 163 U.S. 537 (1896).	43,44,45
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Reynolds v. *Sims*, 377 U.S. 533, 12 L. Ed. 2d. 506 (1964).	46
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Shelley v. *Kraemer*, 334 U.S. 1, 92 L. Ed. 1161 (1948).	19
Sparrow v. *Gill*, 304 F. Supp. 86 (3 Judge Court, M.D.N.C. 1969)	28
Spencer v. *Kugler*, 326 F. Supp. 1235 (D. N. J. 1971), *aff'd*, 404 U.S. 1027, 30 L. Ed. 2d 723 (1972).	39,41,42
Swann v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 28 L. Ed. 2d 544 (1971)	9,10,12,33,36,37,40,41,51,53,54,56
United States v. *Scotland Neck Board of Ecuation*, 407 U.S. 484, 33 L. Ed. 2d 75 (1972)	43,46
United States v. *State of Texas*, 321 F. Supp. 1043 (E.D. Texas 1970).	49
Wright v. *Council of City of Emporia*, 407 U.S. 451, 33 L. Ed. 2d 51 (1972).	40,43,46,50
Zenith Radio Corp. v. *Hazeltine*, 395 U.S. 100, 23 L. Ed. 2d 129 (1969).	64

Page

State Cases:

Ex Rel Workman, 18 Mich. 400 (1869) 14

Governor v. *State Treasurer*, 389 Mich. 1 (1972), vacated and cause dismissed, _____ Mich. _____ (Dec. 7, 1973) ...27,64

Jones v. *Grand Ledge Public Schools*, 349 Mich. 1 (1957). .. 56

Lansing Dist. v. *State Bd. of Educ.*, 367 Mich. 591 (1962). .. 48

Senghas v. *L'anse Creuse* P.S., 368 Mich. 557 (1962) 48

United States Constitution:

Fifth Amendment 3,62

Fourteenth Amendment 3,13,40

United States Code:

28 U.S.C. §1254(1) 2

28 U.S.C. §1292 (b) 1,7

28 U.S.C. §2281 et seq. 65

Federal Rules of Civil Procedure:

Fed R. Civ. P. 54 (b) 1,7

Fed. R. Civ. P. 19 61,63

Fed. R. Civ. P. 24(a) 61, 62

Michigan Constitution of 1963:

Art. 8, §2 46

Art. 8, §3 18,49

Art. 9, §6 46

Art. 9, §11 46

Art. 9, §16 46

Michigan Compiled Laws Annotated

§338.621 27

§340.26 48

§340.27 48

§340.55 48

§340.77 48

	Page
§340.107	48
§340.113	48
§340.148-9	48
§340.165	48
§340.188	48
§340.192	48
§340.352	48,61
§340.355-357	15
§340.563	48
§340.569	48
§340.567	48
§340.574	48
§340.575	48
§340.576b	26,48
§340.582	48
§340.583	48
§340.584	48
§340.585	48
§340.586	48
§340.589	48
§340.591	48
§340.594	48
§340.605	48
§340.609	48
§340.613	48
§340.614	48
§340.643(a)	48
§340.711 et. seq.	26,48
§340.882	48
§388.171 et. seq.	20
§388.851 et. seq.	24

Page

Michigan Public Acts

P.A. 1867, No. 34, §28 14
P.A. 1927, No. 319 (Part II, Chapter 2, §9) 15
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P.A. 1962, No. 175 24,25
P.A. 1969, No. 244 20
P.A. 1970, No. 48, ... 4,8,19,20,21,22,23

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1973

No. 73-436

THE GROSSE POINTE PUBLIC SCHOOL SYSTEM,
Petitioner,

vs.

RONALD BRADLEY, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH COURT

BRIEF FOR PETITIONER
THE GROSSE POINTE PUBLIC SCHOOL SYSTEM

OPINIONS AND ORDERS BELOW

The judgment of the United States Court of Appeals for the Sixth Circuit, reported in *Bradley* v. *Milliken*, 484 F2d 215 (6th Cir. 1973), is contained in the Appendix filed with the Petition for Writ of Certiorari. This judgment was issued upon a rehearing by the Court of Appeals sitting in banc, and was decided and filed on June 12, 1973 (110a). A prior judgment of the Court of Appeals, decided and filed on December 8, 1972, was vacated by the granting of the rehearing in banc. The judgment of December 8, 1972 is reported in *Bradley* v. *Milliken*, 72-1809-1814 (6th Cir. Dec. 8, 1972).

The judgment of the Court of Appeals reviewed the following Rulings and Orders of the District Court, under the provisions of 28 U.S.C. § 1292(b) and Rule 54(b) Fed. R. Civ. P.:

1. Ruling on Issue of Segregation, dated September 27, 1971, reported at 338 F. Supp. 582 [1] (17a).

2. Ruling on Propriety of Considering a Metropolitan Remedy to Accomplish Desegregation of the Public Schools of the City of Detroit, dated March 24, 1972 (48a).

3. Findings of Fact and Conclusions of Law on Detroit-Only Plans of Desegregation, dated March 28, 1972 (53a).

4. Ruling on Desegregation Area and Order for Development of Plan of Desegregation, and Findings of Fact and Conclusions of Law in Support thereof, dated June 14, 1972, reported at 345 F.Supp. 914 (1972) (97a and 59a respectively).

5. Order for Acquisition of Transportation, dated July 11, 1972 (106a).

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1). Certiorari was granted on November 19, 1973.

QUESTIONS PRESENTED

1. Is a Plan of Desegregation, limited to the boundaries of the School District of the City of Detroit, constitutionally insufficient as a result of a finding that it has a predominatly Black school enrollment and therefore may be perceived as a Black school district?

2. Is a "Metropolitan" Plan of Desegregation, intended to achieve a certain pupil racial balance in all schools in the Detroit School District and other school districts outlying therefrom, which are independent municipal bodies corporate, legally proper in the absence of any finding of intentional discriminatory acts by such outlying school districts, or in the establishment of their boundry lines, and in the absence of any finding of a causal connection between alleged discriminatory acts of State defendants

[1] The parenthetical page references followed by the letter "a" refer to the page number of the separate Appendix filed with the Petition for Writ of Certiorari. The parenthetical page references with the Roman numeral and "a" prefix, e.g., (IIa 25), refer to the page numbers of the principal five volume Appendix filed with this Brief. The Constitutional Provisions, Statutes and Rules Involved, which are reprinted at the end of this brief, are referenced to the number of the page at which they appear, followed by the letters "a".

and the predominance of Black or White students in Detroit or the outlying school districts?

3. Have all school districts other than Detroit, potentially the object of a "Metropolitan" Plan of Desegregation, been denied due process of law: (1) by their exclusion from any effective participation in the Detroit Court proceedings culminating in its Rulings on De Jure Segregation in Detroit, sufficiency of a Detroit-Only Plan, and legal propriety of a Metropolitan Plan, and (2) by the ruling of the Court of Appeals that in a "Metropolitan" desegregation case, outlying school districts have a right to participate only in the remedy stage of the proceedings?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The constitutional provisions, statutes and rules particularly relevant to the issues in this case are: U.S. Const. Amend. V; U.S. Const. Amend. XIV; Mich. Const. Art's 8 & 9; 28 U.S.C. §§1254(1), 1292(b) & 2281; Michigan School Code of 1955, Mich. Comp. Laws Ann., §340.1, et seq.; Act 34, Sec. 28, Mich. Pub. Acts of 1867; Act 319, Mich. Pub. Acts of 1927; Act 306, Mich. Pub. Acts of 1937; Act 231, Mich. Pub. Acts of 1949; Act 175, Mich. Pub. Acts of 1962; Act 244, Mich. Pub. Acts of 1969; Act 48, Mich. Pub. Acts of 1970; Fed. R. Cir. P., §§19, 24a & 54(b).

STATEMENT OF THE CASE

Petitioner is one of 85 independent school districts located in the Michigan counties of Wayne, Oakland and Macomb, constituting what was defined by the District Judge to be the "Detroit metropolitan area".[2] Of these 85 school districts, 43 were defendant-intervenors in this action at the time judgment was entered by the Court of Appeals.[3] Of the 43 intervening districts, 34 are included within the "desegregation area" originally established by the District Court in its Order of June 14, 1972 (97a),[4]

[2] Ruling on Propriety of Considering a Metropolitan Plan, (49a).

[3] Subsequent to the entry of the Court of Appeals' judgment of June 12, 1973, the District Court entered an order on September 10, 1973 joining the remaining 42 outlying school districts as parties defendant.

[4] Vacated by the June 12, 1973 judgment of the Court of Appeals. As to its continued significance, See Note 62, and discussion on pg. 35, *infra.*

which "desegregation area" includes a total of 53 districts, encompassing the 34 intervenors, an additional 18 school districts which did not intervene and were not parties to this action at the time of the order,[5] plus the School District of the City of Detroit. All of these school districts are autonomous municipal bodies corporate, being geographically and politically separate and independent, and organized and existing pursuant to the laws of the State of Michigan; each being governed by its respective duly elected board of education.

On August 19, 1970, this action was commenced in the United States District Court for the Eastern District of Michigan, Southern division, by certain named individuals and the NAACP as Plaintiffs, naming in the Complaint (1a): The Board of Education of the City of Detroit and its Superintendent of Schools, the Governor, Attorney General, and the State Board of Education and State Superintendent of Public Instruction of the State of Michigan. The Detroit Federation of Teachers and Magdowski, et al., a Detroit homeowners group, were permitted intervention prior to commencement of the trial.

Plaintiffs' Complaint claimed that as a result of official policies and practices of the original named Defendants, a constitutionally impermissible racially identifiable pattern of faculty and student assignments existed within the schools of the School District of the City of Detroit. Plaintiffs also claimed that Section 12 of Act 48 of the Michigan Public Acts of 1970 ("Act 48") was unconstitutional as interfering with the implementation of a voluntary plan of partial high school pupil desegregation within the School District of the City of Detroit, previously adopted by the Detroit Board of Education on April 7, 1970. By judgment of the Court of Appeals on October 13, 1970, 433 F.2d 897 (6th Cir. 1970), this claim of plaintiffs was disposed of by the Court's ruling that Section 12 of Act 48 was unconstitutional (although that question had not yet been ruled on by the District Court). Plaintiffs' Complaint, which was thus limited to the operation of the Detroit School District alone, was amended for the first time pursuant to direction of the District Court on August 15, 1973, and purported to "conform to the evidence" previously presented in the District Court. Such Amended Complaint (Ia 291) does not include any allegations with respect to actions of school officials

[5] See Note 3, *supra*.

nor the establishment or operation of any school or school district, other than the Detroit School System.

The trial on the merits commenced on April 6, 1971, concluded on July 22, 1971, and concerned only the question of whether the Detroit Public School System was operated in a manner which impaired the constitutional rights of the Plaintiffs within that school district.

During the trial, on July 17, 1971, intervenors Magdowski, et al., moved to join as parties the 84 school districts in the counties of Wayne, Oakland and Macomb, outlying from the City of Detroit. (Ia 119) That Motion was not acted upon until almost one year later, when the Court deemed it to be withdrawn.

The District Court issued its Ruling on Segregation on September 27, 1971 (17a),[6] which found the existence of de jure segregation of students but found no segregation of faculty within the School District of the City of Detroit.

Although the proceedings before the District Court had theretofore been limited to the issue of unlawful segregation in the Detroit School System, on October 4, 1971 the District Court ordered the State defendants to submit a "Metropolitan Plan of Desegregation" for the School District of the City of Detroit, which would embrace the three counties which the District Court defined as comprising the Detroit metropolitan area. Pursuant to this Order, on January 4, 1972 the State Board of Education filed a so-called "Metropolitan Plan of Desegregation", which substantially affected the interests of Petitioner and the other 83 school districts within the three counties, outlying from the City of Detroit.

Consequently, intervention in these proceedings was sought by Petitioner (Ia 185) and 42 other school districts (Ia 189, 192 and 196) for the purpose of representing their interests as municipal bodies corporate and the interests of the parents and children residing therein. Although by Order of the District Court on March 15, 1972 (Ia 204) these Motions to intervene were granted as a matter of right, the District Court in such Order, imposed certain very restrictive and burdensome conditions upon such intervention. The intervening school districts filed written objections to

[6] Ruling on Issue of Segregation, dated September 27, 1971 (17a), hereinafter referred to as "Ruling on Segregation".

these conditions, (Ia 208, 218 and 220) which objections were never acted upon by the courts below.

On March 24, 1972 the District Court issued its Ruling on Propriety of Metropolitan Plan (48a).[7] Only 4 days later, on March 28, 1972, the District Court issued its Ruling on Detroit-Only Plan (53a).[8]

On June 14, 1972, the District Court entered its Ruling on Desegregation Area (59a and 97a).[9] The Findings therein (59a) were virtually verbatim copies of those proposed by Plaintiffs, with the exception of the opening paragraph of its Findings of Fact, wherein the District Court stated:

> "It should be noted that the court has taken no proofs with respect to the establishment of the boundaries of the 86 public school districts in the counties of Wayne, Oakland and Macomb, nor on the issue of whether, with the exclusion of the city of Detroit school district, such school districts have committed acts of de jure segregation." (59-60a).

Notwithstanding this candid admission, the District Court's Order of June 14, 1972 (97a) directed that final details be formulated for a plan of desegregation of the School District of the City of Detroit, involving 52 other independent school districts and ordering the transportation and transfer of pupils as between said school districts "... to the end that, upon implementation, no school, grade or classroom b[e] substantially disproportionate to the overall pupil racial composition" (101-102a) of all school districts within the desegregation area.

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[7] Ruling on Propriety of considering a Metropolitan Remedy to Accomplish Desegregation of the Public Schools of the City of Detroit, dated March 24, 1972, (48a) hereinafter referred to as "Ruling on Propriety of Metropolitan Plan".

[8] Findings of Fact and Conclusions of Law on Detroit-Only Plans of Desegregation, dated March 28, 1972, (53a) hereinafter referred to as "Ruling on Detroit-Only Plan".

[9] Findings of Fact and Conclusions of Law in Support of Ruling on Desegregation Area and Development of Plan, dated June 14, 1972, (59a) and Ruling on Desegregation Area and Order for Development of Plan of Desegregation, dated June 14, 1972 (97a), hereinafter collectively referred to as "Ruling on Desegregation Area".

On July 20, 1972 the District Court entered an Order (Ia 265) declaring its principal prior Orders as final in pursuance of the provisions of Rule 54(b), Fed.R.Civ.P., and further certifying, in pursuance of the provisions of 28 U.S.C. §1292(b), that the said Orders contained certain controlling questions of law.

On December 8, 1972, the Court of Appeals decided and filed its first judgment, which was vacated by its grant of a rehearing in banc on January 16, 1973.

On June 12, 1973 the Court of Appeals, sitting in banc, decided and filed its judgment, from which this appeal has been taken, affirming the District Court's Rulings that (1) Detroit was a de jure segregated school system; (2) that a "Detroit-Only" plan was constitutionally insufficient as a result of Detroit being a "racially identifiable" school district; and (3) that a metropolitan desegregation plan was "essential to a solution of this problem," and would, in all events, be implemented in this case in one form or another. The Court of Appeals, however, remanded the matter to the District Court for the narrow purpose of permitting each of the outlying school districts an opportunity to present evidence on the exact scope and details of the metropolitan remedy.

This Court granted Certiorari on November 19, 1973.

SUMMARY OF ARGUMENT

The lower courts have held that once unconstitutional segregation is found to exist in the operation of a single school district, the remedial order must be extensive enough to make the student racial composition of every school in that district minority Black, so that the school district as a whole will not be "racially identifiable" or "perceived as Black". This is necessary, it is reasoned, even if it requires the reassignment and transportation of hundreds of thousands of students from a number of unitary school systems outlying therefrom, in order to achieve a sufficient racial balance in each school necessary to eliminate such "racial identifiability". The Plaintiffs, therefore, approach the issues in this case on the basis of assuming that the constitutional violations found to exist necessitate a remedy of such scope, so that the only question remaining is whether Federal Courts have the power to order its implementation.

Petitioner, on the other hand, submits that the first question involves examination of the alleged violations. What is the extent and nature of the constitutional violations, if any, committed by Petitioner, the Detroit School System and/or the State defendants, and what nexus is there, if any, between such violations and any segregated condition found to exist? These questions must first be explored and then, and only then, can the appropriate scope of the remedial Order be determined.

Petitioner further submits that although the record may support the finding of discriminatory acts on the part of the Detroit School System, [10] there is nothing in the record substantiating a causal connection between such acts and any segregated condition found to exist with respect to Detroit and the areas outlying therefrom. The same absence of causal relationship is true with respect to the alleged actions by the State defendants, and moreover, the record substantiates no unconstitutional conduct whatsoever on the part of the State defendants and no discriminatory intent on the part of the Michigan Legislature with respect to Act 48, previously found by the Court of Appeals to have had an unconstitutional effect. This being the case, the proposed remedy, which has the necessary effect of transferring children from one community to another for the sole purpose of achieving a particular racial mix in each school in the tri-county area, rather than correcting the limited constitutional violations which may be found in the record with respect to Detroit, is an improper exercise of the power of the Federal Judiciary.

Local school districts have always been established and operated by the State of Michigan on a unitary basis. Consequently, there has never been an affirmative constitutional duty on the part of the State of Michigan to alter the non-discriminatory manner in

[10] Petitioner takes no position on the Correctness of these findings – the Detroit Board of Education having decided not to further prosecute their appeal on that question. As Petitioner stated in its letter to the District Court (Ia 201) regarding conditions on intervention, ". . . we do not wish to litigate the question of *de jure* segregation in the Detroit Public School System." The question of whether such findings are correct or not, however, is totally immaterial to the issue of causal connection between any such discriminatory acts and demographic patterns in the Detroit metropolitan area. Consequently, it will be necessary to review such findings in relation to such causal connection; particularly in so far as acts of the Detroit Board are imputed to the State defendants.

which it has exercised its legislative discretion by maintaining the present system of autonomous school districts for the purpose of preserving its legitimate interest in local control of the education of its children.

Finally, because of the failure of the District Court to permit Petitioner's meaningful participation in the previous trial proceedings, and because of the failure of the Court of Appeals to order a full trial with respect to all violation issues which form the necessary predicates for the implementation of a metropolitan remedial order, Petitioner was denied due process of law.

ARGUMENT

I

Introduction

The conclusions reached in the process of analyzing a problem of first impression, such as that presented by the "Metropolitan desegregation" [11] issue, will greatly depend upon the initial perspective taken in approaching such analysis. One difference in such perspective, as between the Plaintiffs [12] and all of the Petitioners in this cause, has been the initial characterization of this matter as a "violation" case or a "remedy" case.

Plaintiffs' Complaint was limited to the operation of the Detroit School System [13], and the courts below found only constitutional violations with respect to the Detroit schools.

---

[11] The word "Metropolitan" has been used throughout this case to mean a multiple school district area, as distinguished from this Court's use of the word (e.g. in *Swann*, at 21) to mean a large urban area, that was covered by a single school district.

[12] Because of the Detroit Board of Education's present posture with respect to the issues presented in this cause, unless otherwise clearly indicated by the context, the word "Plaintiff" is intended to include the Detroit Board of Education in addition to the named Plaintiffs, Ronald Bradley, et al. and the NAACP.

[13] Indeed, the Amended Complaint recently filed by Bradley, et al. (Ia 291) still fails to allege any acts whatsoever by any School District other than Detroit, or with respect to the non-unitary operation of any School District other than Detroit.

Detroit having been found a de jure segregated system, however, Plaintiffs now assert that the sole remaining question is whether school district boundary lines are so inherently inviolate and sacrosanct as to render any desegregation plan that involves multiple school districts, an improper exercise of the equitable remedial powers of the District Court. [14] Petitioner respectfully submits, however, that under the mandate of *Swann*, [15] it is essential that we examine the true extent and nature of the alleged underlying constitutional violations which, it is claimed, requires a multi-district remedy, before the ultimate propriety of such a remedy is itself examined. [16]

The Ruling on Segregation (17a) held that by reason of certain actions and inactions of the Detroit School District and the

[14] *Brown* v. *Board of Education of Topeka*, 349 U.S. 294, 99 L.Ed. 1083 (1955); *Swann* v *Charlotte-Mecklenberg*, Board of Education 402 U.S.1, 28 L.Ed. 2d 544 (1971).

[15] "As with any equity case, the nature of the violation determines the scope of the remedy." 402 U.S. at 16.

[16] In their opening Brief filed in the Court of Appeals, Bradley, et al. quite perceptively summarized Petitioner's position with respect to the lower Court's failure to relate the remedy to the violation, when they stated, at page 81, "The defendants-appellants would have this court believe that the district court leaped from finding limited violations to fashioning virtually unlimited relief." That is, in fact, precisely the position of Petitioner.

Defendants Milliken, et al., Detroit was a de jure segregated school system. [17] There is no evidence on record, nor were any findings made in the Ruling on Segregation (and indeed, on the basis of the record, none could be made) that in any way related to the question of whether actions of any school officials in Detroit or of the State Defendants had any segregatory effects outside Detroit, or whether any school officials committed any acts of de jure segregation outside of Detroit that had any effects either inside or outside of Detroit.

In the District Court's Ruling on Propriety of Metropolitan Plan, the Court first indicated in an Order [18] that it believed a racial imbalance in the schools to constitute a constitutional violation. The Court stated:

> "Under the circumstances of this case, (6) the question presented is whether the court may consider relief in the form of a metropolitan plan, encompassing not only the City of Detroit, but the larger metropolitan area. . . .

---

[17] The District Court's approach of using a multi-district remedy with respect to a single district violation, irrespective of the necessity for multi-district violations or multi-district causation, by treating it is a *remedy* question only, was implicitly foretold in the following passage from the Ruling on Segregation:

> Having found a de jure segregated public school system in operation in the City of Detroit, our first step, in considering what judicial remedial steps must be taken, is the consideration of intervening parent defendants' motion to add as parties defendant a great number of Michigan school districts . . . Plaintiffs have opposed the motion to join the additional school districts, arguing that the presence of the State defendants is sufficient and all that is required, even if, in shaping a remedy, the affairs of these other districts will be affected.
>
> *In considering the motion to add the listed school districts we pause to note that the proposed action has to do with relief.* Having determined that the circumstances of the case require judicial intervention and equitable relief, it would be improper for us to act on this motion until the other parties to the action have had an opportunity to submit their proposals for desegregation." (38-39a, emphasis added).

[18] The District Court had previously indicated from the bench its predisposition to ordering a multi-district plan, because of the preponderance of black students in Detroit. See page 59, *supra*.

(6) See 'Ruling on Issue of Segregation,' indicating a black student projection for the school year 1980-81 of 80.7%."

Thus, on the basis of speculative, long-range student population projections for Detroit, the Court concluded that the "circumstances" of an increasingly predominant Black student enrollment in Detroit made the implementation of a multi-district remedy legally proper.

Finally, in its Ruling on Detroit-Only Plan, the District Court held that *any* desegregation plan limited to Detroit was constitutionally insufficient, and that only a multi-district plan would be an appropriate remedy. In such Ruling, the District Court set forth Findings of Fact as to why a Detroit-only plan was constitutionally insufficient. The sole substantive reason[19] was the assertion that the racial composition of the student body in Detroit is such that the Detroit Public School System would be "racially identifiable as Black", or would be "perceived as Black" (54-55a).

We must accept as correct the premise for relief counseled in *Swann, supra,* that the nature of the violation determines the scope of the remedy, and the predicate for a finding of violation reaffirmed in *Keyes,*[20] that there be intentionally discriminatory acts and a causal connection between such acts and the segregated condition found to exist. That being so, it must be concluded that the Courts below have actually taken the bold and unprecedented step of holding that racial imbalance in a large metropolitan area, resulting in racial identifiability or perception as Black, is per se, unconstitutional. The lower courts must have so held because they have ordered a multi-district remedy to be implemented without any analysis of the effects of the alleged unconstitutional actions, or any findings whatsoever that there is a causal nexus between such racial imbalance and intentional or purposeful segregatory acts on the part of school officials.

[19] Actually, the District Court also made the finding, which is far more a matter of bootstrapping than of substance, that a Detroit-only plan was insufficient, and thus a metropolitan plan necessary, because a Detroit-only plan would "not lend itself as a building block for a metropolitan plan."

[20] *Keyes* v *School Dist. No. 1,* Denver, Colorado, U.S. , 37 L.Ed. 2d 548 (1973).

That the lower courts have made such a holding is the reason for the observation above, that Plaintiffs and Petitioners have different initial perspectives in approaching this matter; respectively, as a remedy case and as a violation case. Plaintiffs have thus far succeeded in prevailing upon the lower courts to commence with the initial premise that once there is *any* finding of intentionally discriminatory acts by school officials, resulting in a constitutional violation, such finding will automatically trigger a right to relief from racial imbalance and racial identifiability. Approaching the problem from this direction facilitates limitation of further inquiry to only the remedy issue of whether the ultimate powers of the Federal Court are broad enough to include multiple school districts in a desegregation plan.

Obviously, however, this approach to the metropolitan desegregation issue skews the result, and this is where the lower courts have erred. The necessity for the implementation of *any* judicial relief must first be determined by an analysis of the underlying violation. Only a finding of intentional segregative acts by responsible school officials, having a causal connection with the segregated condition found to exist, will form the predicate for relief. It is only then that the question of the propriety and scope of a multi-district remedy in *this* case need be considered.

Unless this Court is now prepared to declare the existence of previously unrecognized Fourteenth Amendment Rights – that Black children have the constitutional right to attend a public school where White children are in the majority – the lower courts must be reversed for having been misguided by Plaintiffs in their approach to the "metropolitan desegregation" issues.

II

THE CONSTITUTIONAL VIOLATIONS

–A–

The Unitary Establishment and Operation of Petitioner School District

In their Complaint, Plaintiffs made no allegations whatsoever with respect to any discriminatory or segregatory actions or inac-

tions of officials of school districts outlying from the School District of the City of Detroit, and the District Court expressly acknowledged making no such findings. It is clear, however, that Petitioner and its predecessors and every other outlying school district in the tri-county area of Wayne, Oakland and Macomb, maintain and operate unitary school systems, and have done so for at least 100 years.[21]

The initial creation of Petitioner's School District boundary lines, as well as those of all other Michigan school districts, were based on neutral and non-discriminatory criteria. For example, as indicated in the Affidavit of Grosse Pointe Schools Re: Boundary Lines and Transportation Facilities (Ia 254) filed pursuant to the direction of the District Court, the present geographical boundaries of The Grosse Pointe Public School System were, with one minor modification, last determined in 1921 [22] by the consolidation of five smaller rural school districts whose boundary lines were originally drawn along township lines and/or naturally existing boundaries. There has never been any gerrymandering of Petitioner's geographical boundaries for any reason whatsoever, much less for reasons motivated by segregative purpose.

The absence in the record of *any* evidence pertaining to the commission of segregatory acts by Petitioner, or any other outlying school district, or with respect to the establishment of their boundaries, was explicitly acknowledged by the District Court in its Ruling on Desegregation Area, as follows:

> "It should be noted that the court has taken no proofs with respect to the establishment of the boundaries of the 86 public school districts in the counties of Wayne, Oakland and Macomb, nor on the issue of whether, with the exclusion of the city of Detroit school district, such school districts have committed acts of de jure segregation." (59-60a)

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[21] *Ex Rel Workman,* 18 Mich. 400 (1869), Act 34, Sec. 28 of Mich. Pub. Acts of 1867.

[22] At that time, Grosse Pointe Schools had a student population of 947, as compared with the commencement of the 1971 school year, when there were 13,529 students.

In summary Petitioner has always operated a unitary school system pursuant to the Constitution and the laws of the State of Michigan [23], from which no child has ever or may now be excluded on account of race. There is *absolutely nothing* in the record of this cause that would indicate actions by Petitioner to the contrary. [24]

—B—

Violations of the Detroit School District

The Opinion of the Court of Appeals reviewed in some detail the discriminatory acts which the District Court found the Detroit School District to have committed. Although it was an Appellant before the Court of Appeals with respect to those findings, the Detroit School District has not sought review of same by this Court. It is pertinent, however, to review the nature of the acts which the Detroit School District was found to have committed, insofar as they may be relevant to the question of a multi-district remedy.

The Court of Appeals affirmed the District Court's findings that the Detroit School District was guilty of segregative practices falling into 3 categories: (1) Segregative zoning and assignment practices; (2) Optional attendance zones; and (3) School construction. With the exception of one specific incident, relating to the Carver School District, [25] there is nothing in the record indicating any relationship whatsoever between the operation of the Detroit School District and other school districts outlying therefrom.

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[23] ". . . Every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color or national origin." Mich. Const. 1963, Art 8, Sec 2.
"No separate school or department shall be kept for any person or persons on account of race or color." Mich. Comp. Laws Annotated, §340.355
"All persons, residents of a school district . . . shall have an equal right to attend school therein." Mich. Comp. Laws Annotated, §340.356 See also Act 319, Part II, Ch.2, Sec. 9, Mich. Pub. Acts of 1927, at p. 3aa, *infra.*

[24] This is at least one distinction between the facts of this case and those before the Court in *Bradley* v. *State Bd. of Educ.*, U.S. , 36 L.Ed. 2d 771 (1973), *aff'd by an equally divided Court*, where all three school districts which were the subject of the proposed multi-district Richmond, Virginia plan had unquestionably been dual school districts.

[25] The Carver School District will be discussed below, in the section on Actions of the Defendants Milliken, et al., at pg 28, *infra.*

The Detroit School District adopted a unique posture before the Court of Appeals by arguing it was not guilty of de jure segregation; but if such finding be affirmed, a metropolitan plan should be implemented as the remedial order. The Detroit School District has now abandoned its initial position, and is currently advocating only for a metropolitan plan, thus rendering it a party in total opposition to the interests of Petitioner. A summary of the Detroit School District's argument concerning the nature and effect of the violations found to have been committed by Detroit, and the causal relationship between such violations and the current condition in such School District is particularly instructive; especially in light of the fact that this argument was previously made in conjunction with its simultaneous argument in favor of a multi-district remedy. In its brief to the Court of Appeals, the Detroit School District argued:

> "As to the role of the acts of the Detroit Board found to be wrongful in causing the current condition of segregation Plaintiffs proferred to the Court their finding of fact which contained only the opinion testimony of several experts to the effect that all-Black and all-White schools tended to reinforce a feeling of sperarateness on the part of both races, which, in turn, manifested itself to some undefinable degree in the choice of residence in uniracial neighborhoods on the part of both races.
>
> *The mind boggles at the meaning of this assumed, unmeasured phenomenon against the standard of proximate cause.* First, the findings of the District Court as to specific acts of discrimination relate to a relatively small proportion of the total school district: the construction of one specified elementary school, out of a total school construction program involving a multitude of schools; several instances of Black-to-Black busing; and the maintenance of six optional zones, which were in the process of seriatim elimination, representing but a small fraction of the total of twenty-one high school constellations in the City of Detroit. *There is not an iota of evidence which shows or which even attempts to show that any person living in the City of Detroit made housing decisions any differently, because of the "acts or failures to act" of the Detroit Board.*

* * *

The most vivid indicator of the lack of any causal nexus between the actions of the Detroit Board and the *current* condition of segregation is the finding (sic) the Court's "Ruling on Detroit-Only Plans", that even had it granted all the relief requested by Plaintiffs, the implementation of a pupil assignment plan within the jurisdiction of the School District of the City of Detroit would nonetheless retain racially identifiable schools. App. I a 459, Vol. I B. *If the District Court, with its broad equitable jurisdiction, is unable to overcome residential housing patters within the City of Detroit to eliminate the condition of racial identifiability in its schools, then the same condition of segregation would exist even if the Detroit Board had acted exactly as the District Court would have had it act.* How then can the Detroit Board be found to have proximately caused that condition, which even the District Court found itself powerless to remedy? The finding is really then not that the Detroit Board should have succeeded in eliminating racial identification in its schools, but that it should have done a better job of failing. If failure to alleviate the conditions is inevitable even for the Court itself, as the Court has effectively found, then the particular quality of the Board's failure can hardly be said to have caused that condition. Absent that causation, Detroit cannot be held to a *de jure* segregated dual system." [26] (Emphasis added)

Petitioner agrees that on the basis of the record, the Detroit Board of Education has never operated a *dual* school system. Detroit has always maintained schools attended by both Blacks and Whites, in varying proportions, depending on the demographic patterns of housing in the city and population shifts over the years. There have always been integrated schools in the City of Detroit, and there has never been a policy of the Detroit Board of Education to establish separate schools for Black and White children in the Detroit Schools any more than there has been a statutory or constitutional provision of Michigan Law requiring separate educational facilities for Black and White children in the State of Michigan.

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[26] Brief of the School District of the City of Detroit in the United States Court of Appeals for the Sixth Circuit, pp. 35-38.

It is also apparent that certain administrative officers of the Detroit School District may have been guilty of certain acts which had either a segregatory purpose, a limited segregative effect, or both. However, Petitioner agrees with the Respondent Detroit School District's description of such acts as being extremely insignificant (in relation to the total operation of that large school district), and their effects as being so minute as to render them non-existent in terms of a causal nexus with segregated housing patterns and racial identifiability. Therefore, the effect of these acts upon the present racial make-up of the Detroit schools, and the school population in Detroit in general, being *de minimus*, it is inconceivable that such acts could have had any causally related ramifications in unrelated, separately operated, autonomous school districts outlying therefrom.

(A)

–C–

Actions of Defendants Milliken, et al

The Court of Appeals affirmed the District Court's findings that the State of Michigan[27] has been guilty of certain constitutional violations, and has divided them into five categories. Because of the particular significance which such findings might have upon the metropolitan remedy issue, Petitioner will discuss them in some detail:

1. The entire text of the first finding is as follows:

"School districts in the State of Michigan are instrumentalities of the State and subordinate to its State Board of Education[28] and legislature (page reference). Hence, the

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[27] Since "State of Michigan" has never been made a party to this action, it is difficult to conceive of how the State, as an entity, could have been found guilty of anything. As to the distinction between the State of Michigan and the State Defendants, reference is to the Brief of Milliken, et al.

[28] Actually, the Detroit School District is "subordinate" only to the Michigan Legislature. The language of the Michigan Constitution of 1963 states that the State Board of Education shall have responsibility for "leadership and general supervision" of local school districts (Mich Const. 1963, Art 8, Sec 3). Also see discussion of the significance of local school districts under Michigan law, page 48, *infra*.

segregative actions and inactions of the Detroit Board of Education previously outlined are the actions of an agency of the State of Michigan." (151a)

Petitioner is at somewhat of a loss as to the significance of this separately enumerated statement; more succinctly stated, the the Detroit Board of Education is an agency of the State of Michigan. If the Court meant that the "State of Michigan", and all levels in its governmental structure, are to have imputed to them, and are to become tainted with the same "guilt" as the Detroit School District may have adjudged against it, Petitioner must take exception. Such a finding, being essentially a legal conclusion, would certainly be a novel application and extension of the doctrine of *respondeat superior.*

No citation of authority having been given, and no further elucidation of such theory having been expressed, however, it must be assumed that the finding is merely declarative of fundamental Constitutional law; [29] that action of a School District is "state action" for purposes of the Fourteenth Amendment to the United States Constitution.

2. The second Constitutional violation found to have been committed by the "State of Michigan" was the enactment by the Michigan Legislature of Section 12 of Act 48 of the Michigan Public Acts of 1970 ("Act 48"). With respect to this statute, the Court of Appeals held:

> "While this statute has since been invalidated by judgment of this court, 433 F.2d 897, its contribution to preventing desegregation and to continuing and increasing segregation of the Detroit school system cannot be overlooked." (151a).

It is submitted that based on the record in this cause, the conclusion expressed in this finding is totally without foundation and amounts to exaggerated supposition and speculation on the part of the Court of Appeals.

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[29] *Brown* v. *Board of Education of Topeka,* 347 U.S. 483, 98 L.Ed. 873 (1954); *Shelley* v. *Kraemer,* 334 U.S. 1, 92 L.Ed. 1161 (1948).

The facts relating to Act 48 are, for the most part, set forth in the reported opinion of the Court of Appeals, [30] and are also ascertainable from a review of the statues themselves. These facts may be briefly summarized as follows.

In 1969, the Michigan Legislature enacted Act 244 of the Michigan Public Acts of 1969,[31] ("Act 244") the purpose of which was to effectuate the "decentralization" of the Detroit Public School System. Decentralization was intended to divide the comparatively large Detroit School Districts into semi-autonomous regions providing some measure of community control by the citizens over the operation of school within a particular region. The experiment into decentralization of the Detroit School District was widely supported by the Black community within Detroit, and no claim has ever been made that the decentralization program was motivated by discriminatory purposes. On April 7, 1970, pursuant to Act 244, the Detroit Board of Education adopted a plan for the division of Detroit into 7 regions. In that same action, the Detroit Board also adopted a plan making changes in the attendance areas of 12 of the School System's 21 high schools, fostering a greater degree of integration. The plan was to be implemented over a 3-year period; commencing with the 10th grade students in the Fall of 1970, and then the 11th grade student in the Fall of 1971, and finally the 12th grade students in the Fall of 1972.

During its 1970 term the Michigan Legislature enacted a number of amendments to Act 244 by enacting Act 48. The purpose of Act 48 was to facilitate the mechanics of decentralization in the Detroit School District by readjusting the regional areas to take into account one-man, one-vote requirements[32] and to adjust certain other provisions relating to salaries, facilities, central board representatives and a number of other matters. Section 12 of Act 48, also contained the following provision:

"Sec. 12. The implementation of any attendance provisions for the 1970-71 school year determined by any first

[30] *Bradley* v *Milliken*, 433 F.2d 897 (1970).

[31] Mich. Comp. Laws Annotated, § 388.171, et seq.

[32] *Hadley* v. *Junior College District of Metropolitan Kansas City*, 397 U.S. 50, 25L. Ed. 2d 45 (1970)

class school district board shall be delayed pending the date of commencement of functions by the first class school district boards established under the provisions of this amendatory act but such provision shall not impair the right of any such board to determine and implement prior to such date such changes in attendance provisions as are mandated by practical necessity. . . ."

The Court of Appeals held on October 13, 1970 [33] that Section 12 of Act 48 had the effect of delaying implementation of the Detroit Board's April 7 Plan for increased integration in the 10th grades, and was therefore "unconstitutional and of no effect as violative of the Fourteenth Amendment."

The motivating purpose behind Section 12 of Act 48 does not appear from the record, and one can only surmise its purpose from the face of the statute. [34] It is certainly clear that there is nothing in the record indicating a segregative purpose or discriminatory motive behind Act 48. [35] Indeed, the Journal of the Senate of the State of Michigan [36] reveals that the Senate vote on Act 48 was 21 yes, 0 no. The yes votes included all 3 Black Michigan senators. [37] In addition, the Journal of the House of the State of Michigan [38] reveals that the House vote on Act 48 was 87 yes, 2 no. The yes vote included all 5 Black Michigan Rep-

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[33] *Bradley* v. *Milliken*, 433 F.2d 897 (6th Cir. 1970), at 904.

[34] It would appear from the face of the statute that at least the primary intent of Act 48 was to enable the newly elected regional boards, under decentralization, to participate in the decision making process with respect to such matters as attendance areas.

[35] See *Keyes*, *supra*, wherein the Court stated: ". . . Where no statutory dual system has ever existed, plaintiffs must prove not only that segregated schooling exists but also that it was brought about or maintained by *intentional* state action." (emphasis added), U.S. at , 37 L.Ed.2d at 557.

[36] 1970 S.J. 97, pg. 1684.

[37] One of the Senators voting in favor of Act 48 was Senator Coleman Young; now the first Black mayor of the City of Detroit.

[38] 1970 H.J. 104, pg. 2856.

resentatives who were present and voting, with the only no votes being cast by White Representatives.[39]

The point of this analysis, simply stated, is that even though it is arguable that there were sufficient grounds for the Court of Appeals to rule Section 12 of Act 48 unconstitutional, purely as a result of its effect on the immediate implementation of the April 7 Plan,[40] there is nothing in the record or otherwise indicating a discriminatory purpose or intent on the part of the Michigan Legislature.[41] The Court of Appeals made no finding as to intent at the time Section 12 was ruled unconstitutional, and any such finding would have had to be based solely upon speculation.

The other aspect of Act 48 which must be examined is the causal connection which it had with integrated and/or segregated education in the City of Detroit.[42] During the 1970-71 school

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[39] Of the 8 Black Senators and Representatives voting on the Act, all 8 voted yes. Notwithstanding the arguable validity of the Court of Appeals earlier decision as to its unconstitutionality solely because of its effect on the April 7 plan, Petitioner is confident that each of those Black legislators would be affronted by the statement contained in the Detroit Board's Response to the Petition for Writ of Certiorari, at p. 48, charging "The Act's statutory stigmatization of black children, because of race. . . ."

[40] Petitioner seriously questions whether Act 48 did in fact have the *necessary* effect attributed to it by the Court of Appeals. Section 12 specifically permitted the Detroit Board to implement attendance area changes in the event they were "mandated by practical necessity". The July 28, 1970 opinion of the Detroit Board's attorney (Ia 30), so heavily relied upon by the Court of Appeals, interpreted this language to mean that where there were "compelling educational reasons", changes in attendance areas could be made. It is respectfully submitted that this language was amply broad to have permitted the Detroit Board of Education to actually implement the April 7 plan in September, 1970, in the event they deemed that the reasons were all that compelling; with the likelihood of judicial interference with so proceeding being nil. The ultimate decision not to proceed still rested with the Detroit Board.

[41] It is submitted that if there had truly been a discriminatory motive or intent behind Section 12, it is more likely that the Legislature would have *prohibited* changes in attendance areas for purposes of increasing integration, rather than only qualifiedly postponing the effective date of any such changes for 4 months and also leaving a large "loophole" which permitted attendance area changes "mandated by practical necessity" to proceed.

[42] Assuming *arguendo* that it was Act 48 that had the necessary effect of delaying implementation of the April 7 Plan. See note 40, *supra*.

year, there were almost 290,000 students in the Detroit School System. The April 7 Plan, in its first year, was intended to affect only 10th grade students in 12 of the 21 Detroit high schools. The resulting delay in implementation, therefore, affected little more than 3,000 students, both Black and White, representing only slightly more than 1% of the entire Detroit school population.

In addition, this delay was, by the terms of the statute, for a four month period from the opening of school in September, 1970, until January 1, 1971.[43] The Court of Appeals, however, ruled on October 13th that that Section 12 was unconstitutional and of no effect – a little over a month after school started. The failure to implement the April 7 Plan at that juncture resulted from the refusal of the Court of Appeals[44] and the District Court[45] to order it into effect, as well as the unwillingness of the Detroit Board of Education to voluntarily direct its implementation.

Thus, the possible extent of any delay in the implementation of the April 7 Plan which can be attributable to Act 48 extends from none at all to a maximum of one month (from the start of school in September, 1970 until the Court of Appeals decision on October 13, 1970), with the number of children affected being less than 1-1/2% of the entire student body of the Detroit School District. The ultimate effect of the delay may be totally unascertainable, but at the same time, common sense dictates that whatever the effect, it was insignificant in terms of the demographic patterns that Plaintiffs now complain of. The nexus between this delay, if any, and the present racial composition of the students in the schools of the City of Detroit is, in any event, not to be found in the record, and Petitioner respectfully submits that an assertion of anything more than a *de minimus* nexus would require greater clairvoyance than would be required to spirit out the underlying motivations of the Black and White Michigan legislators who voted for passage of Act 48.

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[43] Cf. Opinion of the attorney for the Detroit Board of Education that implementation would be delayed, as a practical matter, until September, 1971 (Ia 30).

[44] *Bradley* v *Milliken*, 433 F.2d 897 (6th Cir. 1970) at 904.

[45] *Bradley* v *Milliken*, 438 F.2d 945 (6th Cir. 1971).

3. The third finding affirmed by the Court of Appeals with respect to actions of the Defendants Milliken, et al, related to the power and responsibility of the State Board of Education to approve school building construction plans and school site selection. At one point, the Opinion states that the State Board had, prior to 1962, "specific statutory authority to supervise school site selection" (151a), and at another point, "direct statutory control over site planning for new school construction" (157a). However, the Court of Appeals' opinion does not discuss exactly how these supposed powers and responsibilities are derived from the statutes involved, and therefore, this omission requires detailed review.

The Michigan statute which governs the extent of the control by the State Board of Education over public and private school construction and school sites for the period from 1949-1962 is Act 306 of the Michigan Public Acts of 1937, as amended ("Act 306"),[46] and particularly Section 1 thereof (4aa). In 1949, Section 1 of Act 306 was amended to provide as follows:

> "Sec. 1. No school building, public or private, or additions thereto, shall hereafter be erected, remodeled or reconstructed in the state of Michigan except it be in conformity with the following provisions:
>
> (a) All plans and specifications for buildings shall be prepared by, and the construction supervised by, an architect or engineer who is registered in the state of Michigan. Before the construction, reconstruction or remodeling of any school building or addition thereto is commenced, the written approval of the plans and specifications by the superintendent of public instruction or his authorized agent shall be obtained. *In the approval of plans and specifications the superintendent of public instruction or his authorized agent shall consider in addition to the considerations otherwise mentioned in this act the following factors:*
>
> (1) *The adequacy and location of the site,*
>
> (2) *The educational usefulness of the building,*

[46] Mich. Comp. Laws Annotated, § 388.851, et seq. The entire Act 306 is reprinted in full at the end of this Brief (4aa), together with the 1949 and 1962 amendments thereto, being Act 231, Mich. Pub. Act of 1949 (5aa) and Act 175, Mich. Pub. Acts of 1962 (8aa), respectively.

(3) *The provisions for health and safety.*

The superintendent of public instruction shall publish an informative bulletin which shall set forth good school building planning procedures and interpret clearly the provisions of this act." (6aa, emphasis added)

Subsections (b), (c), (d) and (e) of Section 1 go on to set forth basic specifications for use of fire-resisting materials and fire proofing of school buildings. The remaining sections provide for inspections by the State fire marshal, the responsibilities of the architect, etc.

In 1962, the italicized portion of Section 1, quoted above, was substituted by the following:

"The superintendent of public instruction or his authorized agent shall not issue such approval until he has secured in writing the approval of the state fire marshal relative to factors concerning fire safety and of the health department having jurisdiction relative to factors affecting water supply, sanitation and food handling.

The superintendent of public instruction shall publish an informative bulletin which shall set forth good school building planning procedures and interpret clearly the provisions of this act. The bulletin shall be prepared in cooperation with the state fire marshal and the state health commissioner and, insofar as requirements for approval of plans are concerned, shall be consistent with recognized good practice as evidenced by standards adopted by nationally recognized authorities in the fields of fire protection and health." (8-9aa)

It is perfectly obvious from a reading of this statute as a whole, and particularly the 1962 amendment that broadened and made more general the factors to be considered by the State Superintendent, that these provisions, including the reference to "location", were intended to relate solely to the approval of construction plans for school buildings insofar as fire, health, safety and related matters were concerned. As far as authority over school sites for the period 1949-1962, there is nothing in the statute granting the State Superintendent the power or responsibility to "supervise school site selection", or in the "site planning

for new school construction", as charged in the Court of Appeals decision. This is particularly obvious in light of the fact that these provisions were equally applicable to public and *private* school construction. Approval was sought after the fact. As a practical matter, school sites were, and still are, acquired by the local school school district in pursuance of the statutory powers granted to them. [47] Proposed building plans and specifications are then prepared by an architect hired by the local school district, to be reviewed by the State Superintendent for their adequacy as a functioning school building. For the period 1949-1962, *one* such factor which the State Superintendent was specifically required to take into consideration was the "adequacy and location of the site." But, was that adequacy and location to be viewed in relation to the then existing racial demographic patterns surrounding the site, or was that adequacy and location to be viewed in relation to safety and health aspects of the *school building*, if it were to be located on the proposed site? When looking at the amended statute as a whole, and the specific language in question, the former interpretation simply stretches one's legal imagination to the breaking point. [48]

Plaintiffs may argue that the state educational authorities should be deemed to have an overriding constitutional responsibility to see that any school construction maximizes integration within the State. That, however, is a question [49] totally immaterial to the precise holding of the District Court and the Court of Appeals: that by *statute* the State of Michigan was obligated to supervise and control school site planning and selection in light of maximizing integration. The statute in question does not so provide, and in that respect, the lower courts were clearly in error.

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[47] Mich. Comp. Laws Annotated, § § 340.711 et seq. and 340.26, 340.77, 340.133, 340.165, 340.192 & 340.352.

[48] It is submitted that the 1962 amendment actually makes clear the intent of the former provision, in that it does not prevent the State Superintendent from taking adequacy and location of site into consideration in the approval of plans and specifications, but only deleted the *itemization* of the factors and now allows *all* factors relating to health and safety to be taken into consideration.

[49] The question of the State's affirmative duty to foster integration is discussed *infra*, at pg. 51.

4. The fourth constitutional violation found to have been committed by the "State of Michigan" relates to the failure of the State to allocate to the Detroit School District, funds for pupil transportatotion, even though ". . . such funds were made generally available for students who lived over a mile and a half from their assigned schools in rural Michigan" (151a).[50]

Of the violations found to have been committed, this is certainly the most curious of them all. Petitioner is particularly curious about the alleged denial of constitutional rights, because during the so-called "critical years", Grosse Pointe Schools was *also* denied any allocation of funds for pupil transportation. [51] Since the student body of Grosse Pointe Schools is predominantly White, it appears as though this formula for transportation aid affected both Black and White students alike.

Neither Petitioner nor the Detroit School District were *prohibited* from transporting students -- the question is simply one of reimbursement to the local school districts of funds expended by them in the event the local board of education determines that transportation of certain of its students would be appropriate.

The State Legislature, in deciding whether or not to give local school districts financial assistance in the transportation of students, has made a classification that is based upon the rural vs.

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[50] Although the Court of Appeals did not include it as one of the constitutional violations, the District Court also found that " . . . other financial limitations, such as those on bonding and the working of the State aid formula whereby suburban districts were able to make far larger per pupil expenditures despite less tax effort, have created and perpetuated systematic educational inequalities." This statement is not only factually incorrect, the constitutional questions raised by such statement have since been disposed of by *San Antonio Independent School District* v *Rodriguez*,____U.S.____, 36 L.Ed.2d 16 (1973). See also, *Governor* v *State Treasurer*, 389 Mich 1 (1972), *vacated and cause dismissed*,____Mich____(Dec. 7, 1973).

[51] Under the provisions of Mich. Comp. Laws Annotated, § 388.621, Petitioner, as with the Detroit School District, has been reimbursed by the State for costs related to the transportation of mentally and physically handicapped children. This is to be distinguished from State reimbursement for general transportation purposes. See Affidavit of Grosse Pointe Schools, (Ia 254).

urban school district.[52] This distinction is far from being inherently suspect in and of itself, and its relationship to classification on account of race or discriminatory motive or intent is simply non-existent.[53]

Also puzzling is the causal relationship between this so-called discriminatory statute and segregation in Detroit. On the one hand, the Detroit Board of Education was itself found guilty of committing segregative acts by busing Black children past White schools to Black schools, and yet the State's failure to reimburse Detroit for having done so is supposed to have had a segregative result. The illogic of the argument is patent.

5. The fifth and final constitutional violation found to have been committed by the Defendants Milliken, et al, was the "tacit or express" approval by the State Board of Education of the Detroit School District's transportation of Black children from the Carver School District to the Northern High School in Detroit.[54]

The Testimony[55] of Detroit School District's former Superintendent, Dr. Norman Drachler, concerning the Carver School

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[52] Such a distinction was specifically upheld in *Sparrow* v *Gill*, 304 F.Supp. 86 (3 Judge Court, Md. 1969). It is also submitted that *San Antonio* v *Rodriguez, supra*, is plainly dispositive of this issue in as much as it boils down to a question of school district financing - state aid reimbursement of funds expensed for transportation.

[53] The relationship between the Michigan state aid for transportation statute and racial discrimination was reviewed in *Higgins* v *Bd. of Educ. of the City of Grand Rapids*, Civ. No. 6386 (W.D. Mich., July 18, 1973), where the District Judge held that the statute "... is in no part related to racial difference." Slip opinion, at 3.

[54] The Court of Appeals opinion states that the students came from "the Carver School, located in Ferndale school district". (152a) The record (see note 56 below), as well as the Court of Appeals opinion itself (137-138a) correctly indicates, however, that Carver was itself a separate school district, located in Royal Oak Township, Michigan.

[55] Dr. Drachler's testimony on this subject is in the form of a deposition.

District is virtually the only testimony [56] in the record concerning the Carver School District. A portion of Dr. Drachler's testimony is reprinted in the Court of Appeals opinion (137-138a). This testimony can be briefly summarized as saying that in " '57, '58 " the predominantly Black Carver School District, which did not have a high school, arranged to have its high school students attend school in Detroit, and that they were transported past the predominantly White Mumford High School to the predominantly Black Northern High School. The Court of Appeals omitted the remaining portion of Dr. Drachler's testimony concerning Carver and because of its particular relevance, the remaining testimony is fully reprinted:

"At Northern High School *where we had space* some black students were brought in under a lease from the Carver School District. That was before Carver became a part of Oak Park.

Q. Or Royal Oak Township?

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[56] There was some testimony by Dr. Robert Green, which appears at 8 Tr. 885, 939, 940, and 993-997. The only portion of this transcript included in the Appendix appears at (IIa109-111). The only statement thereof which provides any substantive information on the education of Carver High School children reads as follows:

"A. The bussing was during the period '49 to '52, I know for sure because I was in high school at the time."

Finally, the *only* remaining reference to Carver is a statement by one of Plaintiff's counsel, which appears at (IIa 131) as follows:

"MR. CALDWELL: Your Honor, with reference to something that came up the other day I would like to read one sentence from Plaintiff's Exhibit 78-A which is the September 1959 boundary guide book. I am reading from the center district book, the Northwestern feeder pattern which is described on pages 25 and 26. I will turn back to the Northern pattern feeder maps on page 23 and 24. There is a [1259] footnote for Northern Senior High School that Northern will continue to serve the 9B, the 12A pupils from the Carver School District, Ferndale. That is in the 1959-60 boundary guide book."

In so far as Petitioner has been able to determine, the references cited and quoted herein, together with the portion of Dr. Drachler's testimony quoted in the Court of Appeals decision, constitutes the *entire* record on the subject of the Carver School District.

A. Or Royal Oak Township, [57] that's right. Because they went by Mumford down Wyoming and there were some who thought that we were bussing Detroit black students from the Mumford area all the way to Northern. To my knowledge that was not true. The contract for Carver, if I am not mistaken, had been started when it was not necessarily with Brownell's involvement but when he became aware of it he asked that it be discontinued.

The rationale for not doing it at Mumford which was the nearest school was simply that Mumford was much more crowded, from what I understand, than was Northern and that is the reason they were being bussed there. But nevertheless, that was discontinued and that problem was resolved." (VA 186 emphasis added)

Therefore, the other half of the testimony on the Carver School District, not quoted by the Court of Appeals, reveals the reason why children from Carver, who were accepted in Detroit on a tuition basis, were transported to Northern High School instead of to Mumford High School. There was no room for the students in Mumford. This is the *only* reference in the record to any *reason* for the assignment of the Carver students to Northern, and the only inference that can be drawn from it, is that there was neither discriminatory motive nor intent underlying the decision. To Petitioner's knowledge, Dr. Drachler's testimony, plus that contained in footnote 56, constitutes the *entire* record on the subject of the Carver School District. In sum, it reveals only that Detroit accepted the children from Carver, and it was the decision of the Detroit Board of Education as to which school they were assigned. Any representation by Plaintiffs as to Defendants Milliken, et al

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[57] Although not part of the record, Petitioner believes that some clarification of the geographical location of the Carver School District may be of some assistance, and this statement is made upon information and belief. The Carver School District was located in Royal Oak Township, which Township was surrounded by the City of Berkley on the North, the City of Ferndale on the East, the City of Detroit on the South, and the city of Oak Park on the West. The Northerly portion of Royal Oak Township was in the Berkley School District and the Easterly portion of the Township was in the Ferndale School District. The remaining, or Westerly, portion of the Township formed the separate Carver School District.

knowledge of this fact, or to any discriminatory motive or intent on anybody's part, is purely speculative.

The record does indicate, however, that the Carver School District was subsequently attached to, and became a part of the Oak Park School District in 1960 (138a). At the time of attachment, Oak Park had a virtually all-White student population, and it is now approximately 10% Black. (I a 276). Thus, the only action which took place with respect to Carver, by State level educational authorities, was in fact to remedy any wrongs that might have occurred at the local level; and that remedy took place over 13 years ago.

In summary, any causal relationship between actions of the Detroit Board in assigning Carver students to Northern, and present demographic patterns in the tri-county metropolitan area, is, as a matter of common sense, *de minimus*, and any causal connection that may be speculated upon by Plaintiffs is in fact nonexistent insofar as the record is concerned. In addition, the statement by the Court of Appeals that the assignment of Carver students to Detroit was with the tacit or express approval of the State Board of Education is utterly unsupported by the record. It simply does not exist; either in the form of testimony or even as a part of the District Court's findings. A finding that the State Board of Education had any knowledge whatsoever as to which school in the City of Detroit the Carver students were assigned to, or the racial makeup of that school, is based on pure speculation.

–D–

Summary as to the Alleged Violations

Due to Petitioner's absolute belief, based on a thorough review of the record in this cause, that the Court of Appeal's conclusions regarding the actions of the State Defendants are so com-

pletely without foundation as to be shocking, [58] Petitioner has found it necessary to discuss the same in considerable detail. It is hoped, however, that this Court will recognize that Petitioner has attempted to do this without exaggeration, supposition, speculation or assumption.

The finding that actions of the Detroit School District are "actions of an Agency of the State of Michigan," without more, cannot be quarreled with; but it is in no way legally or factually supportive of any other findings, or the conclusions drawn therefrom.

The findings with respect to discrimination in transportation funds and State Board control over school construction are grossly illogical and unfounded legal interpretations of state statutes; which interpretations are simply not supportable upon an examination of the statutes themselves.

(B) The finding with respect to the Carver School District, at least insofar as it concerns action or inaction by the Defendants Milliken, et al, is based on a record that is virtually non-existent.

Finally, the finding with respect to Public Act 48, the unconstitutionality of which is the *only* finding which in any way is at least arguably a correct legal conclusion, is also subject to the same infirmity that the four other findings are subject to, even assuming *arguendo* they have any initial merit whatsoever, viz: discriminatory intent or purpose, and present causal connection with the racially segregated condition found to exist. It is respectfully submitted that a most thorough examination of the record will disclose nothing to support either intent or nexus, unless pure specu-

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[58] The magnitude of the case is so great, not only in terms of the legal issues involved, but in terms of the number of students and scope of a remedial order, that an adequate record with respect to those facts that would affect the propriety of a metropolitan plan, should be essential. Based on the record that it had before it, it is inconceivable that the Court of Appeals could make the statements that the "State of Michigan" was guilty of discriminatory practices that are "... significant, pervasive and causally related to the substantial amount of segregation found in the Detroit school system by the District Judge." (157a), and that "...the State has been guilty of discrimination which had the effect of creating and maintaining racial segregation along school district lines." (172a) Although these are obvious exaggerations, Petitioner's suggestion of extreme surprise is not.

lation is deemed to constitute a sufficient basis for making findings which might be determinative of the issues of the magnitude and importance as those under consideration. [59]

In his Ruling on Metropolitan Plan (48a), the District Judge made the following statement:

> "As Chief Justice Burger said in *Swann*, 'in seeking to define the scope of remedial power of courts in an area as sensitive as we deal with here, words are poor instruments to convey the sense of basic fairness inherent in equity.' Substance, not semantics, must govern." (50a)

Petitioner agrees that substance is the governing consideration, and indeed, substance, not semantics, must determine the scope of the desegregation plan for Detroit. This brings us full circle, however, to the point made by Petitioner in the introduction to this section – that this must be viewed as a violation case rather than a remedy case; for viewing it as a remedy case concentrates on the rhetorical aspects of whether a metropolitan plan could conceivably be appropriate under any circumstance, rather than concentrating on the substance of the violation in *this* case to determine if the proposed remedy is appropriate. And the substance of the violations reflected in this record establishes nothing justifying a remedial plan of metropolitan scope.

Another aspect of this case which apparently requires a conscious effort in order to sort the substance out of the Court of Appeals Opinion, involves its apparent declaration of new constitutional rights. From an analysis of the proposed remedial Order, and the "problem" that it was attempting to correct, one concludes that either there has been a rhetorical attempt to cover an intentional deviation from the commands of *Swann* and *Keyes*, or else there underlies the lower court's order the substantive, albeit tacit, finding that there is indeed a newly declared violation – "racial identifiability". Petitioner assumes that the latter must be

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[59] As discussed below, it is, in any event, Petitioner's position that short of the commission of segregative acts by school officials of outlying school districts, causing segregated conditions in Detroit vis-a-vis its outlying area, and short of the establishment of school district boundary lines by the State in order to create or maintain segregated schools, a multi-district desegregation remedy is legally impermissible.

the correct interpretation of the lower courts' actions, and the question of racial identifiability as a violation of Fourteenth Amendment rights will be next discussed in, Part III below.

III

THE REMEDY

—A—

The Scope of the Plan

What is the scope of the remedy mandated by the lower court's holdings? It is generally described by the Court of Appeals in the following passage from the Court's opinion:

> "... any Detroit only desegregation plan will lead directly to a single segregated Detroit school district overwhelmingly black in all of its schools, surrounded by a ring of suburbs and suburban school districts overwhelmingly white in composition in a State in which the racial composition is 87 per cent white and 13 per cent black. [60]
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> ***
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> At the outset it is obvious from what we have said pertaining to the inadequacy of any Detroit only desegregation plan that this court feels that some plan of desegregation beyond the boundaries of the Detroit School District is both within the equity powers of the District Court and essential to a solution of this problem." (172-173a).

Inasmuch as the Court of Appeals affirmed the findings of the District Court as to the reasons for the insufficiency of a Detroit-only plan (that the entire Detroit School District would remain identifiably Black and would be perceived as Black) (54-55a) it is quite apparent, in light of the above quoted language, that the

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[60] As pointed out in both the dissenting opinions of Judge Weick (195a) and Judge Kent (224a), the original December 8, 1972 opinion of the three Judge Panel, which opinion was adopted with only minor changes by the Sixth Circuit majority, *in banc*, contained an additional sentence at this point, which stated:

"Big city school systems for blacks surrounded by suburban school systems for whites cannot represent equal protection under the law."

"problem" referred to is the racial perception or identifiability of the Detroit School District with respect to the racial composition of the entire metropolitan area surrounding Detroit. The only viable "solution of this problem" (in the opinion of the lower courts), is to have schools which reflect the racial make-up of the population contained in that appropriate geographical area cut out of that portion of the State of Michigan surrounding Detroit, limited only by considerations of time and distance in the transportation of students.

Although the District Court's Ruling on Desegregation Area (97a) was vacated in part by the Court of Appeals,[61] it remains fully illustrative of the magnitude of the plan which the District Court considered necessary in order to solve the "problem". In that Ruling, the District Court stated:

> "Within the limitations of reasonable travel time and distance factors, pupil reassignments shall be effected within the clusters described in [Plaintiffs proposed 52 school district desegregation plans] so as to achieve the greatest degree of actual desegregation *to the end that, upon implementation, no school, grade or classroom by (sic) substantially disproportionate to the overall pupil racial composition.*" (emphasis added, 101-102a).

Thus, the District Court held that the 52 districts included in the Desegregation Area would provide enough White students, when combined with the students residing in the City of Detroit, to create a minimum racial mix within each class in each school roughly proportionate to the racial make up of the population of the tri-county area, and therefore not racially identifiable. The total number of students involved in the District Court's 52 district desegregation area, based on the 1971-72 population figures, was

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[61] Although substantially vacated, the Court of Appeals continued in existence the Desegregation Panel established in such Order. (178a). In addition, it is quite apparent that this action was taken only to correct what the majority of the Courts of Appeals perceived to be a technical defect in the proceedings below with respect to those 18 school districts included in the District Court's Desegregation Order which had not sought intervention.

779,000; 276,000 in Detroit and 503,000 in the outlying districts. [62]

—B—

The Predicates for Relief: Intent and Nexus

The scope of the District Court's remedy, therefore, is the reassignment, transfer and transportation of hundreds of thousands of students across school district boundaries, so that in the Detroit Metropolitan Area, *every* class in *every* school will have a racial balance of approximately 25% Black and 75% White students. But, if this is the scope of the remedy, how does it relate to the constitutional violations that have been found to have occurred? The simple answer is that it does not, and is therefore in violation of the mandates of *Swann*, which states in part:

> "However, a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution.
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> In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults.
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> School authorities are traditionally charged with broad power to formulate and implement educational policy and

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[62] Plaintiffs will be heard to say that because the June 14, 1973 orders of the District Court have been vacated, no "Desegregation Area" is presently defined and the area and number of students involved is therefore unknown. Petitioner submits, however, that because the effect of the decisions below is to require the cross-district transfer to pupils to the end that after such transfer no school in Detroit will be predominantly black, or perceived as black when viewed against other schools in the metropolitan area, *any* plan which is devised by the District Court to implement this transfer will, of necessity, require the reassignment of hundreds of thousands of students.

might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court. As with any equity case, the nature of the violation determines the scope of the remedy." [63]

In brief, there must be a causal connection between an intentional violation and the condition that the remedy is intended to modify. This elementary precept was last stated and reaffirmed by this Court in *Keyes, supra*. Although the Court's decision in *Keyes* turned on the question of which party has the burden of proving a causal connection with respect to a segregated condition found to exist in one part of a single school district, where the district was unquestionably guilty of having intentionally caused a segregated condition in another part of the same district, the *Swann* limitations on the scope of the remedial order were clearly stated. No de jure segregated condition will be found to exist, and no remedial order may issue to correct the condition, if ". . . a lesser degree of segregated schooling in the . . . area would not have resulted even if the Board had not acted as it did." [64] Further, if for any reason a prima facie case may be found to exist with respect to a single school district, it can be rebutted ". . . by showing that its past segregative acts did not create or contribute to the current segregated condition of the . . . schools." [65]

Even assuming *arguendo* that the Detroit Board of Education and the State Defendants had committed every act the lower courts charged them with, and even if the acts had the resulting effects stated or implied by the lower courts with respect to the schools in Detroit, it still remains unquestionable that had such alleged acts never occurred, the demographic patterns in the

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[63] *Swann, supra*, at 15-16.

[64] *Keyes, supra*, 37 L.Ed.2d at 564.

[65] *Id* at 565.

Metropolitan area and the racial composition of the outlying schools would be unchanged. Petitioner again refers to the argument made by counsel for the Detroit School District in its brief to the Court of Appeals:

> "There is not an iota of evidence which shows or which even attempts to show that any person living in the City of Detroit made housing decisions any differently because of the 'acts or failure to act' of the Detroit Board." [66]

It only stands to reason that if actions of the Detroit Board of Education had no effect on the demographic patterns *within* Detroit, any effect outside of Detroit would be even less likely. When this fact is combined with the conclusions that are compelled by a review of the limited record with respect to alleged acts of Defendants Milliken, et al, any claim that the District Court's proposed remedy was commensurate with the violations, and intended only to correct a condition *caused* by school authorities, is truly falacious.[67] The fact is that *school officials* have not caused the concentration of Blacks in cities, and have not caused them to be surrounded by Whites living in outlying metropolitan areas. Common sense and sociological authority[68] confirms this proposition, and there is absolutely nothing in the record of this cause to indicate anything to the contrary. As stated by the Fourth Circuit in referring to the lack of precise knowledge as to reasons for concentrations of Blacks, [69]

> "Whatever the basic causes, it has not been school assignments, and school assignments cannot reverse the trend."

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[66] See page 16, *supra.*

[67] One of Plaintiffs' witnesses in the District Court was Dr. Karl Taeuber. It is interesting to note Dr. Taeuber's conclusion that the universal characteristic of American cities is residential segregation. Taeuber, *Residential Segregation*, Scientific American, August, 1965. Dr. Taeuber has also found that residential segregation exists "... regardless of the character of local laws and policies and regardless of other forms of discrimination." Taeuber, *Negroes in Cities.*

[68] Id.

[69] *Bradley* v *School Board of the City of Richmond*, 462 F.2d 1058, at 1066 (4th Cir., 1972), aff'd by an equally divided Court, ____U.S.____, 36 L.Ed.2d 771 (1973).

IV

THE PROPOSED DECLARATION OF NEW CONSTITUTIONAL RIGHTS

-A-

The Racial Identifiability Theory

From the preceding discussion, it is clear that Plaintiffs' request for relief cannot be predicated upon the Constitutional violations found by the lower Courts to have been committed – irrespective of the accuracy of such findings. The only logical conclusion one can reach, therefore, is that the Plaintiffs must be tacitly requesting this Court to declare a new constitutional right [70] – freedom from attending a "racially identifiable" [71] – school as well as the corresponding affirmative constitutional obligation of the State [72] to reassign all students within the State in order to eliminate any schools that may be perceived by the community as being Black. [73] There is, however, nothing in the mere racial

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[70] To date, Plaintiffs have not openly sought such a declaration, however the implication for such a declaration is not inconsistent with their emphasis on the "Remedy" nature of these proceedings.

[71] The concept "racial identifiability" or "perception as black" is variously referred to in *Spencer* v. *Kugler* 326 F.Supp. 1235 (D.N.J. 1971) *Aff'd*, 404 U.S. 1027, 30 L.Ed.2d 723 (1972), as "racial imbalance", in *Bradley* v. *Richmond, supra*, as "viable racial mix", and in *Brunson* v. *Board of Tr. of School District No. 1 of Clarendon Co., S.C.* 429 F. 2d 820 (4th Cir. 1970) as the "Pettigrew theory" (concurring opinion of Judge Sobeloff).

[72] These new rights and obligations would mean, of course, that a Black child would *never* be permitted to attend a public school that is predominately Black, irrespective of personal preferences.

[73] In his dissenting opinion, Judge Kent assessed the proposed change in constitutional standard, implicit in the majority opinion, as follows:

"Through the majority's opinion runs the thread which holds it together. That thread is the unwillingness apparent in the minds of the majority to sanction a black school district within a city which it concludes will be surrounded by white suburbs. While the majority does not now state that such a demographic pattern is inherently unconstitutional, nevertheless, I am persuaded that those who subscribe to the majority opinion are convinced, as stated in the slip opinion of the original panel, 'big city school systems for blacks surrounded by suburban school systems for whites cannot represent equal protection of the law.' While that statement has been removed from the opinion of the majority, yet the premise upon which the statement was obviously based must necessarily form the foundation for the conclusions reached in the majority opinion. *It may be that such will become the law, but such a conclusion should not receive our approval on a record such as exists in this case.*" (224a; emphasis added)

composition of the schools which, without more, will support a finding of a denial of equal protection of the laws, guaranteed under the Fourteenth Amendment.[74] And this Court so held in *Swann:*

> "Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools." [75]
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> "If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole." [76]

The conclusions reached from an analysis of the record and the holdings below, bear repeating. Plaintiffs are complaining about a preponderance of Blacks in the Detroit Public Schools, *but there is absolutely nothing to indicate that actions of State or local school officials caused that condition.* Consequently, Plaintiffs must be asking the Court to ". . . require, as a matter of substantive constitutional right, [a] particular degree of racial balance or mix-

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[74] The following observation of Mr. Chief Justice Burger in *Wright* v *Council of City of Emporia,* 407 U.S. 451, at 477, 33 L.Ed.2d 51 at 70 (dissenting opinion) is particularly appropos:

"A local school board plan that will eliminate dual schools, stop discrimination, and improve the quality of education ought not be cast aside because a judge can evolve some other plan that accomplishes the same result, or what he considers a preferable result, with a two percent, four percent, or six percent difference in racial composition. Such an approach gives controlling weight to sociological theories, not constitutional doctrine."

[75] *Swann* v *Charlotte-Mecklenberg Bd. of Educ.,* 402 U.S. 1 (1971) at 23.

[76] *Id.* at 24.

ing. . . .", which has been condemned in *Swann*. Petitioner agrees with this Court's proposed disposition of such a request – it must be disapproved and the lower courts reversed. [77]

This question was also considered in considerable detail in *Spencer v. Kugler, supra*. In that case, Plaintiffs complained that the schools in New Jersey were "racially imbalanced" because of the existence of ". . . school district boundaries thereby rendering racial balance mathematically impossible in many districts. . ." [78] The three-judge District Court framed the issue as follows: [79]

> "Plaintiffs' substantive claim rests wholly on the assertion that there is an affirmative constitutional duty to achieve racial balance among the several districts of a state system of public schools. . . ."

In disposing of this issue, and plaintiffs' claim of denial of equal protection of the laws, the Court in *Spencer* stated: [80]

> "In none of the schools of which the plaintiffs complain is any black pupil 'segregated' from any white pupil. *Indeed,*

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[77] Other panels of the Sixth Circuit have recognized the principle which was ignored by the majority sitting in banc. In *Deal* v. *Cincinnati Bd. of Educ.*, 369 F.2d 55 (6th Cir., 1966), cert. denied 389 U.S. 847 (1967), the Court held that the Cincinnati Board of Education had no constitutional duty to correct a racial imbalance in its schools, where such imbalance was not created by it. The majority in the Opinion below attempts to distinguish *Deal* by saying, quite simply, "There the District Court made findings of fact that there had been no unconstitutional conduct on the part of the Cincinnati Board of Education." (189a). This point highlights the Petitioner's statement at footnote [16], that the Court has "leaped from finding limited violations to fashioning virtually unlimited relief." Unless this Court sanctions a rule that will allow a finding of *any* constitutional violation to trigger the imposition of a remedy that goes beyond any conceivable scope or effect of the violation itself, the opinion below is in irreconcilable conflict with *Deal* and the decisions of this Court discussed above. See also, *Davis* v. *School Dist. of the City of Pontiac*, 443 F.2d 573 (6th Cir. 1971), wherein the 6th Circuit stated, at pg. 575; ". . . a school district has no affirmative obligation to achieve a balance of the races in the schools when the existing imbalance is not attributable to school policies or practices and is the result of housing patterns and other forces over which the school administration had no control."

[78] *Spencer* v *Kugler, supra*, at 1237.

[79] *Id.*, at 1238.

[80] *Id.*, at 1239.

complaint is made that the blacks who reside in the school district served predominate over the whites, thus affording an example of complete desegregation which was the expressed object of the court in the *Brown* case.

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If, as plaintiffs contend, the proportionate black attendance in their respective schools adversely affects the degree of excellence of education which they can receive there must be a point at which any excess of blacks over whites is likely to impair the quality of the education available in that school for the black pupils. Nowhere in the appendix filed by the plaintiffs or in the facts involved in any of the judicial precedents which they cite are we informed of the specific racial proportions which are likely to assure maximum excellence of the educational advantages available for the whites. Assuming further that efforts to achieve the ideal interracial proportion necessarily include the alteration of the population factor determinative of the redistricting, there can be no assurance that the population factor will remain static. If so, it would be necessary to successively reassign pupils to another district as the rate of births and graduations alters the racial proportions creating the demand for educational facilities as it changes from term to term. *In sum, the difficulty complained of does not amount to unconstitutional segregation.*

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The system as provided by the various legislative enactments is unitary in nature and intent and any purported racial imbalance within a local school district results from an imbalance in the population of that municipality-school district. *Racially balanced municipalities are beyond the pale of either judicial or legislative intervention.*" (emphasis added)

This exerpt from *Spencer* is, without more, fully dispositive of the real issue in this case.

Finally, Petitioner submits that this Court's decisions in

Wright v. Council of the City of Emporia[81] and *United States v. Scotland Neck Board of Education*[82] implicitly hold that a plan of desegregation limited to a predominantly Black school system is not insufficient to remedy constitutional violations of its students' rights of equal protection. In *Wright*, the desegregation plan to be implemented was with respect to a school system having a racial make-up of 34% White and 66% Black – almost exactly the same racial composition as the Detroit School System. In *Scotland Neck*, the racial composition of the school system was 77% Black, 22% White and 1% American Indian.

The opinion of the Court of Appeals has charged that to reject their theory–that Black students may not be allowed to predominate in Detroit–is to return to the doctrine of *Plessy* v *Ferguson*.[83] It is respectfully submitted, however, that just the opposite is true, and that the adoption of the lower court's racial identifiability theory would in fact fall within the *Brown I* issue–assignment of Black Detroit children *solely* on the basis of race–and would constitute a retreat from the principles of *Brown I* and a breath of life into *Dred Scott*.[84]

In a concurring opinion in *Brunson*,[85] Judge Sobeloff presented an extremely compelling discussion of this precise question.

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[81] 407 U.S. 451, 33 L.Ed.2d 51 (1972).

[82] 407 U.S. 484, 33 L.Ed.2d 75 (1972).

[83] 163 U.S. 537 (1896). The Court of Appeals stated: "There exists however, an even more compelling basis for the District Court's crossing artificial boundary lines to cure the State's constitutional violations. The instant case calls up haunting memories of the now long overruled and discredited 'separate but equal doctrine' of *Plessy* v *Ferguson*, 163 US 537 (1896). If we hold that school district boundaries are absolute barriers to a Detroit school desegregation plan, we would be opening a way to nullify *Brown* v *Board of Education* which overruled *Plessy*, *supra*." (172a).

[84] *Dred Scott* v *Sanford*, 60 US 393 (1856).

[85] *Brunson* v *Board of Trustees of School Dist. No. 1 of Clarendon County, South Carolina*, *supra*.

His argument could be little improved upon, and deserves extensive quotation: [86]

> "The linch-pin of the dissent is the notion that, ideally, the goal of desegregation should be to achieve an 'optimal mix,' consisting of a white majority. It suggests . . . that desegregation should not go so far as to put whites in minority situations.
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> ***
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> It would, I am sure, astonish the *Brown* court to learn that 16 years later, in a case stemming directly from that decision, it was seriously being contended that desegregation might not be required insofar as it threatened to impair majority white situations.
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> ***
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> *Brown* articulated the truth that *Plessy* chose to disregard: that relegation of blacks to separate facilities represents a declaration by the state that they are inferior and not to be associated with. By condemning the practice as 'inherently unequal,' the Court, at long last, expunged the constitutional principle of black inferiority and white supremacy introduced by *Dred Scott*, and ordered the dismantling of the 'impassible barrier' upheld by that case.
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> The invidious nature of the Pettigrew thesis, advanced by the dissent in the present case, thus emerges. Its central

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[86] Judge Sobeloff's opinion has been quoted, with apparent approval, in an article written by one of Plaintiff's attorneys, Paul R. Dimond. *School Segregation in the North: There Is But One Constitution*, 7 Harvard Civil Rights–Civil Liberties Law Review 1 (1971-1972). In citing Judge Sobeloff's discussion, Mr. Dimond asserts that the claim that there might be "too many blacks" in a school system is a "patent racial insult". Petitioner concurs with this statement but fails to understand how this point avoids being inconsistent with Plaintiffs' assertion that there must not be a preponderance of blacks in the Detroit School District. See also, Jencks, *Inequality: A reassessment of the Effect of Family and Schooling in America*, 40-41 (1972), where he states "This implies that black parents cannot send their children to all-black schools, even if they want to, because all-black schools are by definition inferior. This position strikes me as both racist and politically unworkable over the long haul."

proposition is that the value of a school depends on the characteristics of a majority of its students and superiority is related to whiteness, inferiority to blackness. Although the theory is couched in terms of 'socio-economic class' and the necessity for the creation of a 'middle-class milieu', nevertheless, at bottom, it rests on the generalization that, educationally speaking, white pupils are somehow better or more desirable than black pupils. This premise leads to the next proposition, that association with white pupils helps the blacks and so long as whites predominate does not harm the white children. But once the number of whites approaches minority, then association with the inferior black children hurts the whites and, because there are not enough of the superior whites to go around, does not appreciably help the blacks.

This idea, then, is no more than a resurrection of the axiom of black inferiority as justification for separation of the races, and no less than a return to the spirit of *Dred Scott*. The inventors and proponents of this theory grossly misapprehend the philosophical basis for desegregation. It is not founded upon the concept that white children are a precious resource which should be fairly apportioned. It is not, as Pettigrew suggests, because black children will be improved by association with their betters. Certainly it is hoped that under integration members of each race will benefit from unfettered contact with their peers. But school segregation is forbidden simply because its perpetuation is a living insult to the black children and immeasurably taints the education they receive. This is the precise lesson of *Brown*. Were a court to adopt the Pettigrew rationale it would do explicitly what compulsory segregation laws did implicitly." [87]

Petitioner submits that the racial identifiability theory, when subjected to thorough analysis, is revealed to be nothing more than a theorem of Black inferiority – not self evident, but with all of the invidiousness of *Dred Scott* and *Plessy*, waiting to be proven. It is inapposite to the teachings of *Brown I*, and should not be subscribed to by this court.

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[87] 429 F2d, 824 to 826

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Maintenance of Local School Districts as a Legitimate State Interest

In its Opinion, the Court of Appeals stated: "We reject the contention that school district lines are sacrosanct. . . ." (174a). This is a statement with which Petitioner concurs, and which was never a material issue. None of the Petitioners have ever claimed that school district lines were inviolate or sacrosanct, and this Petitioner does not now so claim. It was a classic straw man proffered by Plaintiffs and grasped by the Court of Appeals as an excuse for disregarding school district boundaries.

In an effort to clearly delineate the essential differences that may exist between Petitioner and Plaintiffs with respect to the legal status of local school districts, Petitioner submits, as correct, the following propositions:

(1) Local school districts in Michigan are not sovereign, but are created by and are subject to the complete power and control of the Michigan Legislature; [88] and

(2) Where *essential* to provide a remedy for a clearly cognizable constitutional violation, political subdivision lines *may* be subject to modification by the exercise of the equitable powers of the federal judiciary. [89]

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[88] Although not essential to the issues herein presented, Petitioner notes that as a result of the Michigan Constitution of 1963 making reference to school districts in four different sections (Art 8, §2; Art 9, §6; Art 9, §11; Art 9, §16) there is a serious legal issue as to whether or not the Michigan Legislature would have the power to abolish school districts altogether.

[89] Clearly, *Gomillion* v. *Lightfoot*, 364 U.S. 339, 5 L.Ed.2d 110 (1960) and *Reynolds* v. *Sims*, 377 U.S. 533, 12 L.Ed.2d 506 (1964) are determinative of the question of the ultimate *power* of the federal court with respect to school district lines. This power was in effect exercised in *Wright* v. *Emporia*, *supra*, and U.S. v. *Scotland Neck*, *supra*. This is in no way, however, determinative of the question posed at the beginning of this brief—What is the violation that is being remedied? It is only when the answer to that question is determined, that this Court need decide the manner in which it will exercise the raw power which it possesses. In any event, however, it is clear that in devising a remedial order, where it is not *essential* to disregard political boundaries, the Court must take them into account and respect their existence, especially where they promote a legitimate State interest. This was explicitly recognized most recently in *San Antonio* v. *Rodriquez*, *supra*.

These statements are not determinative of the Metropolitan desegregation issues, however, because even though school districts are not sacrosanct and may be subject to modification, such modification may be judicially ordered only where essential to remedy the intentional infringement of a fundamental constitutional right. That is so, unless it may be found that the State of Michigan has been under an affirmative constitutional duty to maximize racial balance in the schools within any given geographical area in the State. This affirmative duty would constitute the recognition of yet another new constitutional right, in conflict with the maintenance of the local school district as an integral and legitimate concomitant of the educational system in Michigan. Consequently, the significance of the local school district, and the lack of affirmative constitutional duty to change it, will be explored in some detail.

The Court of Appeals, in discussing the status of school districts under Michigan law, has listed several examples of the exercise of control by the State over the local school district, as justification for their existence now being ignored (165 to 171a). [90] In turn, Petitioner is able to present an extensive list of discretionary powers and authorities granted to local school districts by

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[90] Particularly emphasized is the fact that school districts have in the past been required to be reorganized or merged with other school districts for reasons of administrative efficiency, financial necessity, etc. The court seems to make the unsubstantiated assertion that because the State had the power and exercised it for *those* reasons, there must now be some invidious and discriminatory purpose behind the State failing to take further affirmative action to reorganize school districts in the State to attain the district court's "social goal".

the Michigan School Code of 1955.[91] It is submitted, however, that these lists and counter-lists do nothing more than cloud the *real* significance of local school districts, by laying emphasis on theoretical possibilities in the event of ultimate usurpation. As the District Judge stated, however, "substance, not semantics, must control". And the substantive status of local school districts in Michigan is that of autonomous political bodies corporate, operating through Boards of Education popularly elected[92] by their residents, with the day to day affairs being determined at the local level in accordance with the plenary powers granted to them.

> "The policy of the State has been to retain control of its school system, *to be administered throughout the State under State laws by local State agencies organized with plenary powers to carry out the delegated functions given it by the legislature." Lansing Dist.* v. *State Bd. of Educ.*, 367 Mich. 591 (1962), at 595 (emphasis added)
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> "It is to be noted that school districts possess such power as the statutes expressly *or by reasonably necessary implication grant to them." Senghas* v. *L'Anse Creuse* P.S., 368 Mich. 557 (1962), at 560 (Emphasis in original)

School districts may function cooperatively with townships, counties and cities in the conduct of elections and the assessment and collection of taxes; school districts may be subject to the

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[91] To acquire real and personal property, Mich. Comp. Laws Annotated (MCLA) §§340.26; 340.77; 340.113; 340.165; 340.192; 340.352; to hire and contract with personnel, MCLA §340.569; §340.574; to levy taxes for operations, MCLA §340.563; to borrow against receipts, MCLA §340.567; to determine length of school terms, MCLA §340.575; to control the admission of non-resident students, MCLA §340.582; to determine courses of study, MCLA §340.583; to provide a kindergarten program, MCLA §340.584; to establish and operate vocational schools, MCLA §340.585; to offer adult education programs, MCLA §340.586; to establish attendance areas, MCLA §340.589; to arrange for transportation of non-resident students, MCLA §340.591; to acquire transportation equipment, MCLA §340.594; to receive gifts and bequests, for educational purposes, MCLA §340.605; to employ an attorney, MCLA §340.609; to suspend or expel students, MCLA §340.613; to make rules and regulations for operation of schools, MCLA §340.614; to cause to be levied authorized millage, MCLA §340.643a; to acquire property by eminent domain, MCLA §340.711 et seq.; to approve and select textbooks, MCLA §340.882.

[92] Mich. Comp. Laws Annotated §§340.27, 340.55, 340.107, 340.148-9, 340.188.

"Leadership and general supervision"[93] of the State Board of Education, and school district's powers and responsibilities may be subject to ultimate control of the State Legislature.[94] But when one steps back to look at the overall *functional* status of school districts, whether in Michigan or in any other state where the local district has been similarly structured, is apparent that in their day-to-day management they are operationally autonomous, exercising a multitude of discretionary decisions and being responsive to the needs and desires of the local community and the children they have the responsibility to educate. One only has to attend a public meeting of a local Board of Education and examine the normal lengthy list of administrative matters to be acted upon, and to hear public debate over a particularly delicate community educational issue, to realize that local school districts are not the illusory artifact perceived by the Court of Appeals; existing solely for the purpose of frustrating metropolitan wide integration of the public schools.[95]

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[93] 1963 Mich. Const., Art 8, Sec. 3:

"Leadership and general supervision over all public education, including adult education and instructional programs in state institutions, except as to institutions of higher education granting baccalaureate degrees, is vested in a state board of education. It shall serve as the general planning and coordinating body for all public education, including higher education, and shall advise the legislature as to the financial requirements in connection therewith."

[94] Petitioner submits that the status of school districts in Michigan is not appreciably different from that of school districts in other States, notwithstanding variances in local laws. If anything, local school districts in Michigan enjoy a greater degree of autonomy than in other States. See, e.g., the description of the history and status of school districts in Texas, in *United States* v *State of Texas*, 321 F.Supp 1043 (ED Texas, 1970); and the financial dependence of school districts in Virginia upon the local municipality, described in *Bradley* v *Richmond*, 462 F2d 1058 (1972).

[95] Plaintiffs may be heard to say that the implementation of a metropolitan desegregation plan will have no effect on the viability of local control. One has only to examine the modifications to the administrative structure of schools recommended by the district court's Desegregation Panel and the State Superintendent as being necessary in order to effectuate implementation of the plan, to realize that the viability of the local school district would be destroyed. See the recommendations of the State Superintendent at (Ia 267) and Ia 285) and particularly the recommendations regarding the *final* period of desegregation, at (Ia 278).

The significance of the local school district was recognized in *San Antonio* v *Rodriguez, supra.* Mr. Justice Powell, writing for a majority of the Court, acknowledged the relevance of the local school district in Texas, as follows:

> "In an era that has witnessed a consistent trend toward centralization of the functions of government, local sharing of responsibility for public education has survived. The merit of local control was recognized last Term in both the majority and dissenting opinions in Wright v. Council of the City of Emporia, 407 U.S. 451, 33 L Ed 2d 51, 92 S Ct 2196 (1972). Mr. Justice Stewart stated there that '[d]irect control over decisions vitally affecting the education of one's children is a need that is strongly felt in our society.' Id., at 469. The Chief Justice, in his dissent, agreed that '[l]ocal control is not only vital to continued public support of the schools, but it is of overriding importance from an educational standpoint as well.' Id., at 478, 33 L Ed 2d 51." [96]
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> ". . . Although policy decision-making and supervision in certain areas are reserved to the State, the day-to-day authority over the 'management and control' of all public elementary and secondary schools is squarely placed on the local school boards.
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> It cannot be seriously doubted that in Texas education remains largely a local function, and that the preponderating bulk of all decisions affecting the schools are made and executed at the local level, guaranteeing the greatest participation by those most directly concerned." [97]

The State of Michigan, as most other states, has created a system of public education, granting the front-line responsibility therefor to the representatives elected by the community whose children

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[96] *San Antonio* v. *Rodriguez, supra,* 36 L.Ed.2d at 52.

[97] *Id.*, at 54, n. 108.

are to be educated. In establishing the basic structure for such a system, a primary and legitimate interest was promoted by the State–local control over public education. "Only where state action impinges on the exercise of fundamental constitutional rights or liberties must it be found to have chosen the least restrictive alternative."[98]

Indeed, the State of Michigan could have, and could now, voluntarily exercise its legislative discretion by choosing what the plaintiffs would view as a "less restrictive alternative": affirmatively requiring a representative racial mix in all schools, instead of maintaining locally established and functioning school districts for the education of students in the local community.[99] Short of the necessity of dismantling of the present educational administrative structure, because the structure itself is what impinges on the exercise of fundamental constitutional rights, however, the State's interest in maintaining them on the same basis as they were originally created has a rational relationship with the legitimate state purpose of local control, and is not prohibited by the Fourteenth Amendment. Consequently, unless it can be established that by creating and/or maintaining a state wide system of autonomous and geographically independent school districts, Michigan has deprived or interfered with a fundamental constitutional right of Plaintiffs, it must be concluded that the state was under no affirmative duty to select the "least restrictive alternative."

In their approach to the question of the legal status of school districts under Michigan law, Plaintiffs and the Court of Appeals appear to propose that *all* States have a constitutional duty to take affirmative action, whenever possible, to maximize integration in education; and because school districts are not sovereign entities, the State had the duty to order changes in boundary lines of its school districts, so as to effectuate the maximization of integrated

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[98] *San Antonio* v. *Rodriguez, supra,* at 53.

[99] See quotation from *Swann,* pgs. 36-37, *supra.*

schooling throughout the State.[100] Petitioner submits, however, that the affirmative duty under *Green*,[101] to maximize integration of schools wherever possible, in the process of . . . "the dismantling of well-entrenched dual systems. . ." in historically dual school system states, is to be distinguished from the *prohibition* against taking any intentionally discriminatory action that may cause a segregated condition in schools; which is the standard applicable to non-dual states. As stated by Mr. Justice Brennan in *Keyes, supra*, referring to the *Briggs* v *Elliott*,[102] interpretation of no "affirmative duty to integrate":

> "But Green . . . rejected that interpretation insofar as Green expressly held that 'School boards . . . *operating state-compelled dual systems* were nevertheless clearly charged [by Brown II] with the affirmative duty . . . to convert to a unitary system. . . ." (emphasis added,____ U.S. at____, 37 L.Ed.2d at 559, n. 11)

As further stated in the text of *Keyes* that followed, "This is not a case, however, where a statutory dual system has ever

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[100] In their opening brief to the Court of Appeals, Plaintiffs argued, in referring to the maintenance of school district boundary lines, at page 105, "To us, the power of the Courts to require changes in schemes whose unconstitutional effects were inevitable and foreseeable, and which have no non-discriminatory rationale, is self-evident." In addition, the Court of Appeals stated, (174a), "If school boundary lines cannot be changed for an unconstitutional purpose, it follows logically that existing boundary lines cannot be frozen for an unconstitutional purpose."

[101] *Green* v *County School Board of New Kent County*, 391 U.S. 430, 20 L.Ed.2d 716 (1968).

[102] 132 F.Supp 776 (1955).

existed.[103] The question of affirmative duty is further addressed in *Swann* at pg. 15:

> "The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation *** That was the basis for the holding in Green that school authorities are 'clearly charged with the affirmative duty'. . . . "

But there never has been state-imposed segregation in the State of Michigan, by constitution, statute or general policy, and the entire history of the State of Michigan on this score does not speak otherwise.[104] While the duty to take affirmative steps to maximize integration within a school district *may*, under *Keyes*, exist where officials of a single school system have committed such significant and pervasive discriminatory acts as to constitute it a dual system, the State of Michigan has never been dual, thereby negating any affirmative duty with respect to the State.

Further instructive on this point is the following admonition in *Swann:*

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[103] Petitioner believes that Mr. Justice Powell would concur with the result herein suggested, even under the view that the distinction between de jure and de facto segregation should be abolished. See *Keyes, supra*, dissenting opinion_____U.S._____, 37 L.Ed.2d at 568, where Mr. Justice Powell states, at pg. 584: "The neighborhood school does provide greater ease of parental and student access and convenience, as well as greater economy of public administration. These are obvious and distinct advantages, but the legitimacy of the neighborhood concept rests on more basic grounds. (26) Neighborhood school systems, neutrally administered, reflect the deeply felt desire of citizens for a sense of community in their public education. Public schools have been a traditional source of strength to our Nation, and that strength may derive in part from the identification of many schools with the personal features of the surrounding neighborhood. Community support, interest and dedication to public schools may well run higher with a neighborhood attendance pattern: distance may encourage disinterest. Many citizens sense today a decline in the intimacy of our institutions – home, church, and school – which has caused a concomitant decline in the unity and communal spirit of our prople. I pass no judgment on this viewpoint, but I do believe that this Court should be wary of compelling in the name of constitutional law what may seem to many a dissolution in the traditional, more personal fabric of their public schools.

(26)I do not imply that the neighborhood concept must be embodied in every school system. But where a school board has chosen it, federal judges should accord it respect in framing remedial decrees."

[104] See footnotes 21 & 23, *supra.*

"At some point, these school authorities and others like them should have achieved full compliance with this Court's decision in Brown I. The systems would then be 'unitary' in the sense required by our decisions in Green and Alexander.

It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary." 402 US at 31; 28 L.Ed.2d at 575.

Thus, once a formerly dual state or school district becomes "unitary", there is no longer a *Green* affirmative duty on the part of school officials. However the State of Michigan has always been unitary, and consequently, under *Swann*, the school authorities never were charged with the responsibility to "make year-by-year adjustments" to school district boundary lines in order to take into account population shifts. Although Michigan school district boundary lines have not necessarily been "frozen", [105] neither has there been an affirmative duty on the part of the State to modify them, and therefore, the decision as to how, when and if school districts will be modified lies within the exclusive province of the Legislature of the State of Michigan.

There being a legitimate state interest in maintaining the integrity of the local school district so that it will have the primary responsibility for the education of its resident students, and because the State of Michigan has no constitutional duty to take affirmative action to adjust school district boundary lines so as to

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[105] See note [100], *supra*.

periodically respond to racial population shifts, local school districts cannot simply be ignored in order to attain the District Court's desired social goal.

Petitioner also submits that under *Keyes*, local school districts in Michigan have yet another significance; that is, they may appropriately be viewed as separate, identifiable and unrelated to each other. One aspect of the holding in *Keyes* is that even within a single school district that has practiced deliberate racial segregation in a significant or substantial portion of its system so as to render it a dual system, there may be "natural boundaries" within the system so as to divide it into "separate, identifiable and unrelated units". In such case, the *Green* affirmative duty will not apply with respect to the unrelated area, where no causal connection between the discriminatory actions and the segregated condition in the unrelated area is established.

In discussing the question of whether several areas in Denver were indeed separate, identifiable and unrelated, the Court queried whether there was a high degree of interrelationship among the schools in a certain area. It appears that the logic behind such inquiry is fully applicable to the instant case.

It may be that there are geographical and natural boundaries in the Detroit metropolitan area so as to render Detroit and its outlying districts separate, identifiable and unrelated for that reason, and only a trial on that issue would establish that fact. Petitioner submits, however, that there is no necessity for building a further record in this case, for it is the autonomous nature of local school districts in Michigan that renders them separate, identifiable and unrelated.

Within any single school district, all of its schools are administered on a day-to-day basis by the same administrative staff, under operational policies established by the same Board of Education. Children are routed from the various elementary and junior high schools to the high schools within the same system, and changes in those feeder patterns, for deliberately discriminatory purposes, will necessarily have a reciprocal effect on the other schools within the system–because they are interrelated. Changes in attendance zones will also have the same effect; the gerryman-

dering of an attendance zone necessarily causing a child to attend one school instead of another within the same system. To the extent it may be established that families have a tendency to select residences near schools to which their children are assigned, such discriminatory acts might then have the effect of encouraging Black or White families to select homes near one school or another;[106] *but always within the same school system.* These results arise out of the commonality of jurisdiction with respect to the operation of such schools.

(C) In the event school district boundary lines were gerrymandered for deliberately discriminatory reasons, or in the event Black and White students were exchanged across school district lines for the purpose of maintaining one race schools within the respective districts, the same reciprocal effect upon residential patterns might occur;[107] because of the artificially created interrelationship for segregatory purposes.

Under Michigan law local school districts have the responsibility to educate the students resident within their own boundaries, and no others.[108] There is no administrative or operational interrelationship between several geographically proximate districts and, most importantly, save in exceptional situations,[109] there is no interrelationship of their respective student bodies. Changes in attendance zones, feeder patterns, and

[106] If one of the potential effects of discriminatory school assignments is to cause or maintain a concentration of Blacks in certain areas, the phenomenon has apparently not occurred within Detroit. This is indicated by the rapid outward growth of blacks into previously all White neighborhoods during the "critical years". The Black population in Detroit increased from 16.2% in 1950 to 43.9% in 1970. If anything, it would appear that discriminatory acts, if any, were totally ineffective in this regard and the Black population in Detroit rapidly expanded to make it a city with a predominantly Black student body; not because of discriminatory factors, but because of the lack of them.

[107] But only if school assignments do, in fact, have the "profound reciprocal effect on the racial composition of residential neighborhoods" as observed in *Keyes*, relying on *Swann*. With all due respect, however, Petitioner seriously questions the validity of this statement as a matter of actual fact, as opposed to sociological theory. Substantive authority that this phenomenon exists to any significant extent appears to be lacking.

[108] *Jones* v *Grand Ledge Public Schools*, 349 Mich 1 (1957).

[109] For example, pupil exchanges for the education of physically and mentally handicapped children.

the location of a new school within one school district could not possibly have a reciprocal effect upon the residential patterns in another school district, due to the lack of interrelationship between them.[110] The assignment of Black students in Detroit to a predominantly Black high school rather than to a predominantly White high school, could not conceivably have had the effect of deterring Black families from moving into another city outlying from Detroit, because so long as such students remained residents of Detroit, they could not have attended school in such outlying area in the first place. In summary, due to their autonomy of operations, one from the other, Petitioner submits that local school districts are in fact "separate, identifiable and unrelated units".

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Summary as to New Constitutional Rights

Plaintiffs have sought to have the lower courts judicially sanction the social goal which they wish to attain – racial balance in all schools in the Detroit metropolitan area. In responding to the Plaintiff's request, however, the lower courts have failed to properly assess the constitutional violations which were alleged to have occurred, so as to determine if there was a judicially cognizable factual predicate for the implementation of the proposed metropolitan relief. Because the above analysis indicates that such predicates do not in fact exist, it only follows that new constitutional violations have been declared. Additional analysis reveals, however, that the racial identifiability theory is inapposite to *Brown*, and there is also no affirmative constitutional duty imposed on the State to modify the manner in which it has chosen to educate its children, through the locally controlled school district.

Thus, Plaintiff's desired social and educational ends may not be judicially obtained through the guise of the enforcement of

[110] Plaintiffs will undoubtedly argue that the interrelationship lies in the fact of ultimate State control over school districts. The answer is, however, that this is only theoretical control (as might be the case with actual administrative power of a single school board over geographically unrelated units within a single district), as opposed to functional control, which simply does not exist at the State level, in any significant manner, with respect to the operations of local districts.

constitutional rights, because no violation of such rights has occurred which would authorize judicial interference of the scope requested. In such regard, Plaintiffs are cautioned to accept the following advice from *Rodriguez, supra:*

> The ultimate wisdom as to these and related problems of education is not likely to be divined for all time even by the scholars who now so earnestly debate the issues. In such circumstances the judiciary is well advised to refrain from interposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever changing conditions." 36 L. Ed. 2d at 49.
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> "We hardly need add that this Court's action today is not to be viewed as placing its judicial imprimatur on the status quo. * * * But the ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them." 36 L. Ed. 2d at 57 & 58.

V

VIOLATION OF PETITIONER'S RIGHTS OF DUE PROCESS

In the Introduction to the Argument of this Brief, Petitioner noted the fact that the lower courts and Plaintiffs prefer to commence the discussion of the issues in this case with the question of remedy rather than that of violation. The question of the infringement of Petitioner's rights of due process is also subject to this same problem of basic initial perspective.[111] If the question is solely one of the nature of the multi-district remedy that is to be

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[111] As stated in the dissenting opinion of Judge Kent:

> *"The suggestion by the District Court that the suburban school districts were only involved in the remedy points up the trap into which both the District Court and the majority of this Court have fallen in failing to recognize the necessity for finding a violation before a remedy may be imposed.* (238a emphasis added)

implemented in response to their "racial identifiability" thesis, the problem of Petitioner's right to be heard on *all* matters, including violation questions, may be somewhat limited. Because no metropolitan remedial order can permissibly be implemented without proof of some intentional violation having a causal effect within Petitioner's school district, however, there is absolutely no way to avoid the fact that Petitioner is an essential and necessary party with respect to *all* issues in this cause – remedy *and* violation.

In order to adequately present to the Court the basis upon which Petitioner claims a denial of due process, further elaboration of the proceedings in the District Court is necessary. During the course of the trial on the merits the District Judge first acknowledged the possibility of a metropolitan plan issue in this case, when he stated from the bench, on June 24, 1971: ". . .[A]s I have said to several witnesses in this case: 'How do you desegregate a black city, or a black school system;' " (243a) On July 17, 1971, a Detroit homeowners group, Magdowski, et al., (which had previously been permitted intervention, *without* conditions), filed a Motion to Join Additional Parties Defendant, (Ia 119), requesting the District Court to join the 84 school districts in Wayne, Oakland and Macomb Counties so that "complete relief [can] be awarded the plaintiff", because without such districts there would be an "unconstitutional burden on the intervening defendant, in that the resulting school district of the City of Detroit would be and will remain as established by the proofs already submitted an inferior school district." (Ia 120).

This motion was never ruled upon by the Court, and was deemed by the Court to be withdrawn almost one year later. Thus, *prior* to completion of the trial on the merits, the District Court expressed the possibility that it might find it necessary to implement relief against Petitioner, and in addition, had before it a motion to add Petitioner as a party.

The District Court followed its September 27, 1971 Ruling on Segregation with an Order on October 4, 1971 requiring the Defendants Milliken, et al, to submit a "Metropolitan Plan of Desegregation", within 90 days. With the filing of such a Plan by the State Department of Education on January 4, 1972, Petitioner and other suburban school districts were suddenly confronted

with the dilemma of either being subjected to a judicial remedy without ever having had the opportunity to be heard, or of seeking intervention. Because it appeared that the District Court intended to implement relief against Petitioner without offering it a "day in court", Petitioner sought intervention, which was granted on March 15, 1972. (Ia 204).

This grant of intervention proved to be illusory indeed, for the District Judge imposed extremely restrictive conditions on the participation of the intervenors (Ia 206-207), even though intervention had been granted as a matter of right, pursuant to Fed. R. Civ. P. 24(a). Then, a rapid succession of events took place as follows.

On the day intervention was granted, the District Court advised the intervening school districts that they would be required to adhere to the March 22, 1972 date the Court had previously set for filing briefs on the legal propriety of a metropolitan plan of desegregation. Consequently, Petitioner and the other intervening school districts had exactly one week to prepare and present to the District Court their legal arguments with respect to such an important and complex issue, in the form of written briefs, and without the benefit of oral argument. On March 24, 1972, only two days following the due date for such briefs, the District Court issued its Ruling on Metropolitan Plan (48a). Seven separate briefs totalling 112 typewritten pages were simultaneously filed on March 22, [112] and yet the District Court wrote, typed, and distributed its Ruling within 36 hours after such briefs were filed.

On March 28, 1972, the District Court commenced taking testimony on a metropolitan plan, which was the first opportunity which the intervening school districts' attorneys had to appear in the District Court to participate in the proceedings. Only two hours later the District Court distributed its Ruling on Detroit-Only Plans (53a); concluding that a metropolitan plan was not only proper, but necessary.

Thus, by the District Court's control over the timing of events which occurred upon intervention, Petitioner was effec-

[112] In addition, at this time the United States filed a 27 page memorandum in connection with its Motion to Intervene.

tively foreclosed from any meaningful participation in the proceedings relative to the necessity or propriety of a metropolitan plan. Indeed, one can only conclude that the District Court had in fact determined prior to intervention that it would be necessary to desegregate the Detroit Public Schools by involving Petitioner's children, and consequently the fundamental predicates for the imposition of judicial sanction–claim, proof, finding of a wrong and causation–were either ignored by the District Court or intentionally given minimal consideration.

Under Michigan law, Petitioner is a municipal body corporate, having the power to sue and be sued, and having an indispensable right to be heard with respect to any proceedings involving issues affecting the education of its resident students.[113] This was acknowledged by the District Court in granting intervention of right under Fed. R. Civ. P. 24(a) and by the Court of Appeals in ordering joinder of the remaining districts under Fed. R. Civ. P. 19. As such, Petitioner was and is entitled to fundamental rights of due process of law, including the opportunity to be heard in a meaningful way:

> "A fundamental requirement of due process is 'the opportunity to be heard.' . . . It is an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong* v *Manzo*, 380 U.S. 545, 522 14 L. Ed. 2d 62 (1965).
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> "We have frequently emphasized that the right to confront and cross-examine witnesses is a fundamental aspect of procedural due process." *Jenkins* v *McKeithen*, 395 U.S. 411, 428 23 L. Ed. 2d 404 (1969)[114]

However, Petitioner never was given an opportunity to participate in the trial of the essential issues concerning the violations which form the predicate for Petitioner's inclusion in a plan of metro-

[113] Mich. Comp. Laws Annotated, §340.352.

[114] See also *In Re Oliver*, 33 U.S. 257 92 L. Ed. 682 (1948) and *Railroad Commission of Calif.* v. *Pacific Gas & Electric*, 302 U.S. 388 82 L. Ed. 319 (1938).

politan relief.[115] The failure of the District Court to afford Petitioner an opportunity to be heard, when these issues which so vitally affect it were being judicially determined, constitutes a blatant denial of fundamental due process of law guaranteed under the Fifth amendment.

The Court of Appeals did not address itself to the issue of Petitioner's denial of due process by the District Court, but only to the question of the applicability of Fed. R. Civ. P. 19, so as to require the inclusion of all other potentially affected school districts before the remedy is implemented. The Court of Appeals refused, however, to vacate the District Court's order that there *would* be a metropolitan style remedial order implemented, affecting the outlying school districts. thus, the Court of Appeals actually compounded the due process problem by ordering additional outlying districts to be joined, as indispensable parties, and at the same time denying them the right to introduce any evidence on the basic issues of whether or not the violation was in fact of such a scope as to require the implementation of a plan substantially affecting the educational process of their children. The error committed by the lower courts with respect to both the intervenor school districts, and the newly joined districts, was separately expressed by all three dissenting judges, as follows:

> *"However, in its opinion the majority did provide for amendment of pleadings on remand, making new party defendants, for intervention, and for offering additional testimony. These provisions are wholly illusory with respect to the issues of segregation, the 'Detroit-Only plan' and the 'Metropolitan plan', as the opinion expressly excludes these items from reconsideration upon the remand."* (Judge Weick, 206a, emphasis added).

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[115] For an example of a case where such rights were properly safeguarded, see *Higgins* v *Bd. of Educ. of City of Grand Rapids, supra*, where the District Court ordered joinder as parties defendant 11 suburban school districts prior to the trial on the merits of the de jure segregation claim. The District Judge stated: "Thus all parties who might be affected by any judgment of the court were given the opportunity to defend on the issues of constitutional violations charged against them by the plaintiffs." Slip opinion, pg. 3. See also, *Bradley* v. *School Board of the City of Richmond*, 338 F.Supp. 67 (E.D. Va. 1972).

The situation in this case is pointed up by the language found at 3B Moore's Federal Practice ¶24.16[4], 2d Ed.

> *"It would be meaningless to give him an absolute right to intervene in order to protect his interest, if once in the proceeding he were barred from raising questions necessary to his own protection."* (Judge Kent, 237a, emphasis added).

***

To permit these additional parties to be heard only in the restricted sense set forth in the majority opinion is to deny them basic rights guaranteed not only by Rule 19, Federal Rules of Civil Procedure, but by the Constitution itself." (Judge Miller, 240a, emphasis added).

As indicated by his statement from the bench on June 24, 1971, [116] it was apparent to the District Judge at that time that he might find it necessary to include suburban districts in a desegregation order. A few weeks later, a Motion to join all outlying school districts was filed. At this stage of the proceedings it was still quite feasible for *all* outlying school districts to have had full and meaningful participation with respect to all principal issues ultimately ruled on by the Court.

Judge Kent expressed the problem as follows:

> "The errors to which we have already alluded were brought about by the failure on the part of the District Court to require that *all* interested parties be brought into the case at the earliest appropriate moment. [117] (230a, emphasis in original)

The presence of the State Defendants is no answer to the failure to join Petitioner and other school districts against whom relief might be granted. Petitioner is an independent municipal body corporate, and can be represented in this action by no other

[116] Quoted above, at pg. 59.

[117] In addition to Petitioner and other intervening school districts, the 18 non-intervening districts are similarly affected. As Judge Weick observed of the 18 districts, "They have surely been deprived of their property rights, not only without due process of law, but without any process of law." (207a).

party. This basic proposition was last affirmed in the case of *Zenith Radio Corp.* v. *Hazeltine Research*, 395 US 100, 23 L.Ed. 2d 129 (1969), which involved the entry by the District Court of a judgment against a parent corporation, where the only defendant before the Court was a wholly owned subsidiary of the parent. There existed a commonality of officers, and the defendant subsidiary had even entered into a stipulation that the parent and the subsidiary would be "considered as one entity" for purposes of the trial. In holding that the parent corporation could *not* be represented by its subsidiary in the cause, however, this Court stated, at p. 110:

> "It is elementary that one is not bound by a judgment in personam resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process."

Petitioner submits that the principle of *Hazeltine* is fully applicable to the instant case, and the errors committed by the District Court in denying Petitioner due process of law are not mitigated by the presence of Defendants Milliken, et al. [118]

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[118] As an indication of the inability of the State Defendants to represent the interest of Petitioner, at the same time that Petitioner was before the District Court in connection with the metropolitan remedy hearings, the Petitioner was engaged in the trial of a suit brought against Petitioner and two other school districts challenging the constitutionality of Michigan's system of financing public education. *Governor* v *State Treasurer, supra.*

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgments of the courts below should be reversed.[119]

Respectfully submitted,

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December 28, 1973

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[119] Should this Court determine that a remand of this cause is necessary, it should also be made aware of an additional problem which may be an appropriate subject in an Order of Remand. In their Brief to the Court of Appeals, Petitioner school districts asserted that the District Court was without jurisdiction to order implementation of a Metropolitan Plan of Desegregation for the reason that the granting of such relief would necessarily constitute the enjoining, as a result of the unconstitutionality thereof, of the enforcement, operation or execution of certain provisions of the Michigan Constitution and statutes of statewide application, in pursuance of which all independent Michigan school districts are organized and operated. The Court of Appeals, however, chose to totally ignore this problem notwithstanding the provisions of 28 U.S.C. §2281 et seq. requiring the convening of a District Court of three judges.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment V provides:

> AMENDMENT V – CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY
>
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV, Section 1, provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Michigan Constitution of 1963, Art. 8, §2 provides in part:

> Free public elementary and secondary schools; discrimination.
>
> SEC. 2. The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law. Every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color or national origin.

Michigan Constitution of 1963, Art. 8, § 3 provides, in part:

> State board of education; duties.
>
> Sec. 3. Leadership and general supervision over all public education, including adult education and instructional programs in state institutions, except as to institutions of higher education granting baccalaureate degrees, is vested in a state board of education. It shall serve as the general planning and coordinating body for all public education, including higher education, and shall advise the legislature as to the financial requirements in connection therewith.

UNITED STATES STATUTES

Judicial Code, 28 U.S.C. § 1254(1) provides:

> 1254. Courts of appeals; certiorari; appeal, certified questions
>
> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods;
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Judicial Code, 28 U.S.C. § 1292(b) provides:

> § 1292. Interlocutory decisions
>
> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate terminationof the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay pro-

ceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Judicial Code, 28 U.S.C. §2281 provides:

§2281. Injunction against enforcement of State statute; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

MICHIGAN STATUTES

Act 34, Sec. 28, Mich. Pub. Acts of 1867 provides:

(2271) Sec. 28. All residents of any district shall have an equal right to attend any school therein: *Provided*, That this shall not prevent the grading of schools according to the intellectual progress of the pupils, to be taught in separate places when deemed expedient.

Act 319, Part II, Ch. 2, Sec. 9, Mich. Pub. Acts of 1927, provides:

SEC. 9. All persons residents of any school district, and five years of age, shall have an equal right to attend any school therein; and no separate school or department shall be kept for any person or persons on account of race or color: *Provided*, That this shall not be construed to prevent the grading of schools according to the intellectual progress of the pupil, to be taught in separate places as may be deemed expedient.

Act 306, Mich. Pub. Acts of 1937, provides:

AN ACT to promote the safety and welfare of the people of the state of Michigan by regulating the construction of certain public buildings, and to define the class of buildings affected by this act; to prescribe the powers and duties of the fire marshal with respect thereto; to prescribe penalties for the violation of this act; and to repeal all acts and parts of acts, general, local and special, inconsistent with or contrary to the provisions of this act.

The People of the State of Michigan enact:

Public or private school buildings; construction regulations and requirements.

Section 1. No school building, public or private, or additions thereto, shall hereafter be erected in the state of Michigan except it be in conformity with the following provisions of this act:

1. This act shall apply to school buildings having more than one story. If it shall be designed for class rooms in the basement, then the basement shall be considered as one floor. School gymnasiums, school cafeterias, school auditoriums and school places of assembly shall be specifically included under the provisions of this act.

2. All plans and specifications, for buildings under the scope of this act, shall be prepared by, and the construction supervised by, an architect or engineer who is registered in the state of Michigan.

3. All walls, floors, partitions and roofs shall be constructed of fire-resisting materials such as stone, brick, tile, concrete, gypsum, steel or similar fire-resisting materials. All steel members shall be protected by at least three-fourths of an inch of fire-resisting material.

4. No wood lath or wood furring shall be used. However, these regulations shall not be construed as prohibiting the use of wood flooring on masonry sub-floors, or the use of wood sleepers, wood cabinets, or wood trim.

5. Every room enclosing a heating unit shall be enclosed by walls of fire-resisting materials and shall be equipped with automatically-closing fire doors; and said heating unit shall not be located directly beneath a class room: *Provided further,* That in any school where natural gas or any other kind of gas shall be used for heating purposes said gas shall be chemically treated before being used in such a manner as to give a very distinguishable odor if any leak should develop in the heating system.

6. In gymnasiums, fire-proofings may be omitted from the trusses and purlins if they are more than sixteen feet off the main floor level; also, from the steel supports of the running track. The running track shall be constructed of wood not less than two inches thick. It shall be the duty of the architect or engineer to provide adequate exits. In all cases there shall be at least two stairways and the distance from the door of any class or assembly room to a stairway or exit shall not exceed one hundred feet.

Architect or engineer, responsibilities.

Sec. 2. The architect or engineer preparing the plans and specifications or supervising the construction of any such building shall be responsible for constructing the building of adequate strength so as to resist fire, and constructing the building in a workmanlike manner.

Inspection during construction by state fire marshal, powers.

Sec. 3. The state fire marshal shall inspect any such building to determine whether or not the construction thereof complies with the provisions of this act. Each building shall be inspected by the state fire marshal at least twice during construction, one inspection to be made of the frame work of the building prior to plastering and one inspection shall be made on the completion of the building. With respect to such inspections, the state fire marshal shall have the same powers as set forth in act number one hundred seventy-eight of the public acts of nineteen hundred fifteen, as amended, being sections six hundred three to six hundred twenty, inclusive, of the compiled laws of nineteen hundred twenty-nine.

Violation of act by architect or engineer, penalty.

Sec. 4. The license or registration of any architect or engineer convicted of violating any of the provisions of this act shall be revoked. In addition, any architect or engineer violating any of the provisions of this act shall be guilty of a misdemeanor and upon conviction shall be punished as provided by the laws of this state.

Severing clause.

Sec. 5. Should any provision or section of this act be held to be invalid for any reason, such holding shall not be construed as affecting the validity of any remaining portion of such section or of this act, it being the legislative intent that this act shall stand, notwithstanding the invalidity of any such provision or section.

Exemption.

Sec. 5a. The provisions of this act shall not apply to the construction or alteration of any rural school building or gymnasium where the total cost thereof does not exceed five thousand dollars.

Repeal.

Sec. 6. All acts and parts of acts, general, local and special, are hereby superseded and repealed insofar as inconsistent with the provisions of this act.

This act is ordered to take immediate effect.

Act 231, Mich. Pub. Acts of 1949, provides:

AN ACT to amend sections 1, 1a, 2, 3 and 5a of Act No. 306 of the Public Acts of 1937, entitled as amended "An act to promote the safety, welfare and educational interests of the people of the state of Michigan by regulating the construction, reconstruction and remodeling of certain public or private school buildings or additions thereto, by regulating the construction, reconstruction and remodeling of buildings leased or acquired for school purposes, and to define the class of buildings affected by this act; to prescribe the powers and duties of the superintendent of public instruction, the state fire marshal, architects, engineers and school board members with respect thereto; to prescribe penalties for the violation of this act; and to repeal all acts and parts of acts, general, local and special, inconsistent with or contrary to the provisions of this act," as amended and added by Act No. 148 of the Public Acts of 1941, being sections 388.851, 388.851a, 388.852, 388.853 and 388.855a, respectively, of the Compiled Laws of 1948.

The People of the State of Michigan enact:

Sections amended.

Section 1. Sections 1, 1a, 2, 3 and 5a of Act No. 306 of the Public Acts of 1937, as amended and added by Act No. 148 of the Public Acts of 1941, being sections 388.851, 388.851a, 388.852, 388.853 and 388.855a, respectively, of the Compiled Laws of 1948, are hereby amended to read as follows:

388.851 Public or private school buildings; construction requirements.

Sec. 1. No school building, public or private, or additions thereto, shall hereafter be erected, remodeled or reconstructed in the state of Michigan except it be in conformity with the following provisions:

(a) All plans and specifications for buildings shall be prepared by, and the construction supervised by, an architect or engineer who is registered in the state of Michigan. Before the construction, reconstruction or remodeling of any school building or addition thereto is commenced, the written approval of the plans and specifications by the superintendent of public instruction or his authorized agent shall be obtained. In the approval of plans and specifications the superintendent of public instruction or his authorized agent shall consider in addition to the considerations otherwise mentioned in this act the following factors:

(1) The adequacy and location of the site.

(2) The educational usefulness of the building.

(3) The provisions for health and safety.

The superintendent of public instruction shall publish an informative bulletin which shall set forth good school building planning procedures and interpret clearly the provisions of this act.

(b) All walls, floors, partitions and roofs shall be constructed of fire-resisting materials such as stone, brick, tile, concrete, gypsum, steel or similar fire-resisting materials. All steel members shall be protected by at least ¾ of an inch of fire-resisting material.

(c) No wood lath or wood furring shall be used: Provided, however, That these regulations shall not be construed as prohibiting the use of finished wood flooring, wood door and window frames, wood sash or wood furring and grounds, for the purpose of installing wood trim, panelling, acoustical units or similar facing materials on masonry walls, structural steel or concrete ceiling members.

(d) Every room enclosing a heating unit shall be enclosed by walls or fire-resisting materials and shall be equipped with automatically closing fire doors; and said heating unit shall not be located directly beneath any portion of a school building or addition thereto which is constructed or reconstructed after the effective date of this act: Provided, That this regulation shall not be construed to require the removal of an existing heating plant from beneath an existing building when an addition to such building is constructed unless the state superintendent of public instruction or his authorized agent, acting jointly with the state fire marshal, shall so require in the interests of public safety: Provided further, That in any school where natural gas or any other kind of gas shall be used for heating purposes said gas shall be chemically treated before being used in such a manner as to give a very distinguishable odor if any leak should develop in the heating system.

(e) In gymnasiums, fire-proofings may be omitted from the trusses and purlins if they are more than 16 feet off the main floor level. It shall be the duty of the architect or engineer to provide adequate exits from all parts of school buildings. In all cases there shall be at least 2 stairways and the distance from the door of any class or assembly room to a stairway or exit shall not exceed 100 feet.

388.851a Definitions.

Sec. 1a. Words and phrases used in this act shall be defined as follows:

(a) "School buildings" shall include all buildings used for school purposes.

(b) "Remodeling" shall mean the alteration, construction or remodeling of partitions, hallways, stairways and means of egress, the replacement, relocation or reconstruction of heating, ventilating and sanitary equipment.

(c) "Addition" shall mean added space which results in additional cubic contents to existing building.

(d) "Total cost" shall be interpreted to mean the monetary worth of the building when ready for occupancy, regardless of the source of funds, labor or material and shall include the cost of general construction, plumbing, heating and ventilation, electrical work, all fixed equipment, together with the cost of architects, engineers and building superintending services.

(e) A building having a basement shall be considered to be a 2 story building for the purposes of this act.

388.852 Architect or engineer, responsibilities.

Sec. 2. The architect or engineer preparing the plans and specifications or supervising the construction of any school building shall be responsible for constructing the building of adequate strength so as to resist fire, and constructing the building in a workmanlike manner, according to the plans and specifications as approved.

388.853 Inspection during construction by state fire marshal; powers; duty of architect to notify.

Sec. 3. The state fire marshal shall inspect any building to determine whether or not the construction thereof complies with the provisions of this act. Each building shall be inspected by the state fire marshal at least twice during construction, 1 inspection to be made of the frame work of the building prior to plastering and 1 inspection shall be made on the completion of the building. The architect shall notify the state fire marshal when the building is ready for inspection. With respect to such inspections, the state fire marshal shall have the same powers as set forth in Act No. 207 of the Public Acts of 1941, as amended, being sections 29.1 to 29.25, inclusive, of the Compiled Laws of 1948.

388.855a Application of act; exemptions.

Sec. 5a. Except as hereinafter provided the provisions of this act shall not apply to 1-story school buildings or to 1-story additions thereto nor shall it apply, except as hereinafter provided to the construction, reconstruction or remodeling of any school building where the total cost of such construction, reconstruction or remodeling is less than $15,000.00.

Subdivision (a) of section 1 of this act shall apply to the construction of all school buildings and additions to school buildings regardless of the number of stories of such buildings or additions where the total cost of such construction shall exceed $15,000.00.

Subdivision (d) of section 1 shall apply to the construction of all school buildings and additions thereto of 1 or more stories regardless of the cost of their construction.

The provisions of this act shall also apply to the reconstruction of a school building destroyed or partially destroyed by fire, windstorm or other catastrophe if more than 50 per cent of the entire building is so destroyed. The state fire marshal acting jointly with the superintendent of public instruction may require that the damaged portion and/or the remaining portion of the building be remodeled or reconstructed in accordance with the provisions of this act. This act shall also apply to the remodeling of existing school buildings and other buildings to be used for school purposes.

No existing building or part of building regardless of the number of its stories or its cost to the school district which has not had prior use as a school building shall be so used until such use shall have been approved by the superintendent of public instruction and the state fire marshal.

For all construction, reconstruction or remodeling of school buildings where the total cost is less than $15,000.00, it shall not be necessary that a registered architect or engineer be employed but the plans for such buildings shall be submitted to the superintendent of public instruction or his authorized agent for criticism, suggestions and approval.

This act is ordered to take immediate effect.

Approved May 31, 1949.

Act 175, Mich. Pub. Acts of 1962, provides:

AN ACT to amend sections 1, 3 and 5a of Act No. 306 of the Public Acts of 1937, entitled as amended "An act to promote the safety, welfare and educational interests of the people of the state of Michigan by regulating the construction, reconstruction and remodeling of certain public or private school buildings or additions thereto, by regulating the construction, reconstruction and remodeling of buildings leased or acquired for school purposes, and to define the class of buildings affected by this act; to prescribe the powers and duties of the superintendent of public instruction, the state fire marshal, architects, engineers and school board members with respect thereto; to prescribe penalties for the violation of this act; and to repeal all acts and parts of acts, general, local and special, inconsistent with or contrary to the provisions of this act," as amended by Act No. 231 of the Public Acts of 1949, being sections 388.851, 388.853 and 388.855a of the Compiled Laws of 1948.

The People of the State of Michigan enact:

Sections amended.

Section 1. Sections 1, 3 and 5a of Act No. 306 of the Public Acts of 1937, as amended by Act No. 231 of the Public Acts of 1949, being sections 388.851, 388.853 and 388.855a of the Compiled Laws of 1948, are hereby amended to read as follows:

388.851 Public or private school buildings; construction requirements, waiver.

Sec. 1. No school building, public or private, or additions thereto, shall hereafter be erected, remodeled or reconstructed in the state of Michigan except it be in conformity with the following provisions:

(a) All plans and specifications for buildings shall be prepared by, and the construction supervised by, an architect or engineer who is registered in the state of Michigan. Before the construction, reconstruction or remodeling of any school building or addition thereto is commenced, the written approval of the plans and specifications by the superintendent of public instruction or his authorized agent shall be obtained. The superintendent of public instruction or his authorized agent shall not issue such approval until he has secured in writing the approval of the state fire marshal relative to factors concerning fire safety and of the health department having jurisdiciton relative to factors affecting water supply, sanitation and food handling.

The superintendent of public instruction shall publish an informative bulletin which shall set forth good school building planning procedures and interpret clearly the provisions of this act. The bulletin shall be prepared in cooperation with the state fire marshal and

the state health commissioner and, insofar as requirements for approval of plans are concerned, shall be consistent with recognized good practice as evidenced by standards adopted by nationally recognized authorities in the fields of fire protection and health.

(b) All walls, floors, partitions and roofs shall be constructed of fire-resisting materials such as stone, brick, tile, concrete, gypsum, steel or similar fire-resisting material. All steel members shall be protected by at least ¾ of an inch of fire-resisting material.

(c) No wood lath or wood furring shall be used: Provided, however, That these regulations shall not be construed as prohibiting the use of finished wood flooring, wood door and window frames, wood sash or wood furring and grounds, for the purpose of installing wood trim, panelling, acoustical units or similar facing materials on masonry walls, structural steel or concrete ceiling members.

(d) Every room enclosing a heating unit shall be enclosed by walls or fire-resisting materials and shall be equipped with automatically closing fire doors; and said heating unit shall not be located directly beneath any portion of a school building or addition thereto which is constructed or reconstructed after the effective date of this act: Provided, That this regulation shall not be construed to require the removal of an existing heating plant from beneath an existing building when an addition to such building is constructed unless the state superintendent of public instruction or his authorized agent, acting jointly with the state fire marshal, shall so require in the interests of public safety: Provided further, That in any school where natural gas or any other kind of gas shall be used for heating purposes said gas shall be chemically treated before being used in such a manner as to give a very distinguishable odor if any leak should develop in the heating system.

(e) In gymnasiums, fire-proofings may be omitted from the trusses and purlins if they are more than 16 feet off the main floor level. It shall be the duty of the architect or engineer to provide adequate exits from all parts of school buildings. In all cases there shall be at least 2 stairways and the distance from the door of any class or assembly room to a stairway or exit shall not exceed 100 feet.

(f) Provisions in subsections (b) through (e) may be waived in writing by the state fire marshal.

[MSA 15.853] Inspection by state fire marshal; notice by architect; municipal fire prevention and safety measures.

Sec. 3. Except as hereinafter provided, the state fire marshal shall inspect any building to determine whether or not the construction thereof complies with the provisions of this act. Each building shall be inspected by the state fire marshal at least twice during construction, 1 inspection to be made of the frame work of the building prior to plastering and 1 inspection shall be made on the completion of the building. The architect shall notify the state fire marshal when the building is ready for inspection. With respect to such inspections, the state fire marshal shall have the same powers as set forth in Act No. 207 of the Public Acts of 1941, as amended, being sections 29.1 to 29.25, inclusive, of the Compiled Laws of 1948.

(a) The state fire marshal shall not be required to inspect or make any determination of fire safety in any existing school building insofar as operation, maintenance, remodeling, or repairs for fire safety is concerned if such school building is located in a municipality where both the school board of such a school and the governing body of the municipality in which such a school is located have certified to the state superintendent of public instruction, in a manner prescribed by him, that the fire safety inspections and fire safety measures for the schools located in the municipality are provided for by a municipal code or ordinance that is administered and enforced by a full time fire prevention and safety department, division, or bureau maintained by the municipality and are satisfactory to both such school board and governing body. Either such school board or governing body may rescind the certification.

388.855a Application of act; exemptions.

Sec. 5a. Except as hereinafter provided the provisions of this act shall not apply to 1-story school buildings or to 1-story additions thereto nor shall it apply, except as hereinafter provided to the construction, reconstruction or remodeling of any school building where the total cost of such construction, reconstruction or remodeling is less than $15,000.00.

Subdivision (a) of section 1 of this act shall apply to the construction of all school buildings and additions to school buildings regardless of the number of stories of such buildings or additions where the total cost of such construction shall exceed $15,000.00.

Subdivision (d) of section 1 shall apply to the construction of all school buildings and additions thereto of 1 or more stories regardless of the cost of their construction.

The provisions of this act shall also apply to the reconstruction of a school building destroyed or partially destroyed by fire, windstorm or other catastrophe if more than 50 per cent of the entire building is so destroyed. The state fire marshal acting jointly with the superintendent of public instruction may require that the damaged portion and/or the remaining portion of the building be remodeled or reconstructed in accordance with the provisions of this act. This act shall also apply to the remodeling of existing school buildings and other buildings to be used for school purposes.

No existing building or part of building regardless of the number of its stories or its cost to the school district which has not had prior use as a school building shall be so used until such use shall have been approved by the superintendent of public instruction and the state fire marshal.

For all construction, reconstruction or remodeling of school buildings where the total cost is less than $15,000.00, it shall not be necessary that a registered architect or engineer be employed but the plans for such buildings shall be submitted to the state fire marshal and to the superintendent of public instruction or his authorized agent for criticism, suggestions and approval.

This act is ordered to take immediate effect.

Act 244, Mich. Pub. Acts of 1969, provides:

AN ACT to require first class school districts to be divided into regional districts and to provide for local district school boards and to define their powers and duties and the powers and duties of the first class district board.

The People of the State of Michigan enact:

388.171 First class school district; division. [M.S.A. 15.2298(1)]

Sec. 1. Not later than January 30, 1970, the school board of each first class district shall divide its district into not less than 7 nor more than 11 regional school districts with not more than 50,000 nor less than 25,000 students in each district.

388.172 Same; board; regional members; present members, term.

Sec. 2. In addition to the present members of the first class board there shall be elected by the registered and qualified electors of each district to the first class board 1 member from each of the districts for a term of 4 years. The members of the first class school district board provided in section 2 to be elected by regions shall be elected in the general election to be held in November, 1970 and every fourth year thereafter for a term commencing on January 1 next following their election. The candidates shall be nominated in primary elections in the manner provided by law for the present first class school district members.

The term of office of the present first class school board members shall hereafter be 4 years. The terms of office of present first class school board members which expire June 30, 1971 are extended to January 1, 1973. The term of office of present first class school board members which expire June 30, 1973 are shortened to January 1, 1973. The 5 at large positions on the first class district school board which expire January 1, 1973 shall be filled at the general election to be held in November, 1972 for a term of 4 years. The terms of office of present first class school district board members which expire on June 30, 1975 are extended to January 1, 1977 and shall be filled at the general election to be held in November, 1976 for a term of 4 years.

[illegible].173 Regional boards; size; qualifications; election; term.

Sec. 3. In each regional district there shall be elected 9 members to the regional board. No person shall be elected who is not a resident of the regional district from which he is elected. The members shall be nominated and elected by the registered and qualified electors of each district as is provided by law for the nomination and election of first class school board members except that signatures required on nominating petitions shall be not less than 500 nor more than 1,000. The members shall be elected for terms of 4 years. Except that of the members elected at the general election in 1970 the 5 members receiving the highest number of votes shall be elected for a term of 4 years and the 4 members receiving the next highest number of votes shall be elected for a term of 2 years.

[illegible].174 First class district board, powers.

Sec. 4. The first class school district board shall retain all the powers and duties now possessed by a first class school district except for those given to a regional school district board under the provisions of this act.

[illegible].175 Regional board, powers.

Sec. 5. Effective upon the commencement of its term of office, the regional school district board. subject to guidelines established by the first class district board, shall have the power to:

(1) Employ and discharge a superintendent for the regional school district from a list or lists of candidates submitted by the district board.

(2) Employ and discharge, assign and promote all teachers and other employees of the regional school district, subject to review by the first class school district board, which may overrule, modify or affirm the action of the regional district board.

(3) Determine the curriculum, use of educational facilities and establishment of educational and testing programs in the regional school district.

(4) Determine the budget for the regional school district based upon the allocation of funds received from the first class school district board.

[illegible].176 Employee rights.

Sec. 6. The rights of retirement, tenure, seniority and of any other benefits of any employee transferred to a regional school district or between regional school districts from the first class district shall not be abrogated, diminished or impaired.

[illegible].177 First class district board, functions.

Sec. 7. The first class school district board shall perform the following functions for the regional school districts:

(1) Central purchasing.

(2) Payroll.

(3) Contract negotiations for all employees, subject to the provisions of Act No. 336 of the Public Acts of 1947, as amended, being sections 423.201 to 423.216 of the Compiled Laws of 1948, and subject to any bargaining certification and to the provisions of any collective bargaining agreement pertaining to affected employees.

(4) Property management and maintenance.

(5) Bonding.

(6) Special education programs.

(7) Allocation of funds for capital outlay and operations to each regional school district.

(8) On or before November 1, 1970, establish guidelines for the implementation of the provisions of section 5.

Act 48, Sec. 12, Mich. Pub. Act of 1970, provides:

388.182 Attendance provisions, implementation; conditions. [M.S.A. 15.2298(12)]

Sec. 12. The implementation of any attendance provisions for the 1970-71 school year determined by any first class school district board shall be delayed pending the date of commencement of functions by the first class school district boards established under the provisions of this amendatory act but such provision shall not impar the right of any such board to determine and implement prior to such date such changes in attendance provisions as are mandated by practical necessity. In reviewing, confirming, establishing or modifying attendance provisions the first class school district boards established under the provisions of this amendatory act shall have a policy of open enrollment and shall enable students to attend a school of preference but providing priority acceptance, insofar as practicable, in cases of insufficient school capacity, to those students residing nearest the school and those studnets desiring to attend the school for participation in vocationally oriented courses or other specialized curriculum.

Michigan Compiled Laws Annotated, §340.1 et seq, being the Michigan School Code of 1955, provides, in pertinent part, as follows:

Michigan Compiled Laws Annotated, §340.352 provides:

340.352 Body corporate; powers, rights, liabilities; presumptions

SEC. 352. Every school district shall be a body corporate under the name provided in this act, and may sue and be sued in its name, may acquire and take property, both real and personal, for educational purposes within or without its corporate limits, by purchase, gifts, grant, devide or bequest, and hold an use the same for such purposes, and may sell and convey the same as the interests of such district may require, subject to the conditions of this act contained. As such body corporate, every school district shall be the successor of any school district previously existing within the same territorial limits and shall be vested with all rights of action, with the title of all property, real and personal, of the district of which it is the successor, and the indebtedness and obligations of the district superseded shall become and be the indebtedness and obligations of the succeeding district, except as otherwise provided in chapters 3, 4 and 5, part 2 of this act. Every school district shall in all cases be presumed to have been legally organized when it shall have exercised the franchises and privileges of a district for the term of 2 years; and such school district and its officers shall be entitled to all the rights, privileges and immunities, and be subject to all the duties and liabilities conferred upon school districts by law.

Because of the extensive list set forth therein, those portions of the Michigan School Code of 1955, referred to in note 91 on pg. 48, are not reprinted herein.

FEDERAL RULES OF CIVIL PROCEDURE

Fed. R. Civ. P. 19 provides:

Rule 19. Joinder of Persons Needed for Just Adjudication.

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede

his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. This rule is subject to the provisions of Rule 23.

Fed. R. Civ. P. 24(a) provides:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to

intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject to the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 54(b) provides:

Rule 54. Judgments; Costs

(b) Judgment upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counter-claim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.